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# RAILROAD REPORTS

(Vol. 28 American and English  
Railroad Cases, New Series)

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LAST RESORT

IN THE

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VOLUME V.

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# RAILROAD REPORTS

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GULF, C. & S. F. RY. CO. *v.* HILL *et al.*

(*Supreme Court of Texas, June 23, 1902.*)

[69 S. W. Rep. 136.]

**Injury to Switchman—Negligence—Giving Kick Signals—Custom—Instruction.**

In an action against a railroad company for the death of a yard switchman, alleged to be due to the negligent giving of a "kick" signal while he was uncoupling the car about to be kicked, an instruction that, if there was a general custom in defendant's yard, then, unless plaintiff established that the signals given were not the proper and customary signals, the jury should find for defendant, without regard of any other issue, was properly refused, as requiring plaintiff to prove that the signals were not customary, regardless of whether they were reasonably safe, and of whether deceased knew of the custom relied on.

**Same—Assumption of Risk—Contributory Negligence—Plaintiff's Evidence.**

Where, in an action for the death of a servant, plaintiff's evidence is such as to require an instruction on contributory negligence and assumed risk, even if defendant has offered no evidence, but not such as to authorize an instruction that such defenses were established as a matter of law, an instruction that the burden of proving such defenses is on defendant is improper, as tending to lead the jury to believe that they should consider only the evidence offered by defendant on such issues.

**Certified questions from court of civil appeals of First supreme judicial district.**

Action by Isabella Hill and another against the Gulf, Colorado & Santa Fe Railway Company. Judgment in favor of plaintiffs, and defendant brings error to the court of civil appeals, which certifies questions to the supreme court. Questions answered.

J. W. Terry and Chas. K. Lee, for plaintiff in error.

Lovejoy, Sampson & Malevinsky, for defendants in error.

BROWN, J. The court of civil appeals of the First supreme judicial district has certified to this court the following statement and questions:

"This suit, which is now pending before us on motion for rehearing, was brought by Isabella Hill, for herself and as next friend of her two minor children, to recover of the defendant damages for the alleged negligent killing of her husband, J. H. Hill. Judgment was for plaintiff in the court below, and the defendant railway company brought the cause here by writ of error. We set out fully the facts found by us from the record, because such a statement is necessary to a comprehension of the questions hereinafter propounded, in their relation to the entire case:

"Plaintiffs allege as a basis for recovery that the deceased was a switchman in the employ of defendant, and was, at the

date of the accident which caused his death, engaged, with other members of a switching crew, in doing some switching in the yards at Galveston; that it was the purpose of those thus engaged to kick the end car of a string of cars they were handling into a side track, without following it in with the rest of the train; that, in order to do this, the train, as it backed in the direction of the switch, was to be slowed down to a slow rate of speed, whereupon it became the duty of deceased to uncouple the end car; that, in doing so, it was proper for no one to give the kick signal except deceased; that he undertook to uncouple the cars, and while doing so his fellow switchman, without warning him, negligently gave the kick signal, in response to which the speed of the train was suddenly and violently increased, whereby he was knocked down, run over by the cars, and killed; that the signal which caused his death was given by one Fewell, and that his coemployees were negligent in taking the signal from Fewell, but should have waited until the deceased had signaled that the cut had been safely made. In addition to the general denial, the defendant pleaded specially that deceased's injuries and death resulted from one of the risks ordinarily incident to his employment; pleaded his contract of employment, in which he acknowledged himself familiar with defendant's rules; agreed to look to his coemployees for all necessary information looking to his safety; agreed that in every case of doubt he would take the safest course; that he would avoid taking risks, would familiarize himself with the rules, conform his acts to their requirements, and report all infringements thereof. Such of the rules as are supposed to be applicable are pleaded, but it is not necessary to set them out in this connection. It was further averred in defense that the kicking of the car had been prearranged, and the programme fully understood by the deceased; that he knew it would be his duty to uncouple the car, that same would be kicked, and that it was his duty to give the kick signal before uncoupling, or see that it was given; that the signal that was given was usual and customary, and one that deceased knew would be given in doing the work; that such was the usual and customary way of doing the work in the Galveston yards, wherefore it is alleged the danger therefrom was one of the ordinary risks of the employment; that the cars were equipped with automatic couplers, which rendered it unnecessary for him to go in between the cars, or to expose any part of his body between them; and that if he did so he assumed the risk. It was also charged that he was guilty of contributory negligence in exposing himself between the cars without either having given the signal, or knowing it had been given; that, though expressly warned by the rules to look out for signals, take no risks, etc., he failed to take these precautions, and therefore was the cause of his own injury.

"J. H. Hill, the husband of the plaintiff in this case, was on

## Gulf, C. &amp; S. F. Ry. Co. v. Hill

March 9, 1900, an employee of defendant, in the capacity of switchman, and between five and six o'clock on the afternoon of the day named, while engaged in switching in the yards of defendant at Galveston, he was run over and killed by defendant's train. At the time of the accident he was engaged in switching, and was, as expressed by the witnesses, 'working in the field.' The crew had been out in the west yards, near the bay bridge, in the city of Galveston, and had come back from the west with a string of 25 or 30 cars,—mostly box cars; the engine being at the rear end of the train, backing it up. The front car of the train as it backed was a flat car, loaded with lumber, and the next two cars were cinder cars. Deceased rode from the west yards to the middle yards, near Forty-Second street, on the front end of the flat car, as they backed up. The other members of the crew were John McCarty, foreman; C. A. Hooks, another switchman; Chris. Miller, engineer; and Thomas Gillam, the fireman. In coming from the west yards, the train of cars was propelled at a speed of about ten miles an hour, but, when it neared a point designated as 'Fogarty Switch,' it was slowed down to a speed of two or three miles an hour for the purpose of allowing Hill to alight, throw the switch for 'rip track No. 2,' on which it was intended to place the end car, and to uncouple the car so it could be kicked in. Fewell, the night yard master, was near the switch, and receiving from McCarty a signal as to what was intended, threw the switch, and Hill proceeded at once to uncouple the car. McCarty saw him approach the point in the train where the uncoupling was to be made, and reach out as if to take hold of the uncoupling lever, but at that point he ceased to be in view of McCarty. No witness testifies that the acts of Hill were seen after that, though the track at that point was straight. Fewell, who was then standing at the switch, and had thrown it for the side track, and who was a considerable distance from Hill (some of the witnesses placing him as much as 75 yards away), gave the kick signal. This was received by McCarty, who transmitted it to the engineer, who obeyed it without knowing the exact position of Hill. In response to the kick signal, the speed of the train was increased from two or three to seven or eight miles an hour. It was at once discovered that Hill was under the train, and Fewell gave the emergency stop signal. The train was promptly stopped. The car as in fact uncoupled, and, as a result of the response to the kick signal and the increased speed of the train, rolled into the side track as intended. Hill was found between the rails, with his arm and leg crushed,—two of the cars having passed over him,—and he died a few hours later. He was a sober, experienced, and efficient switchman, and had been at work in defendant's yards at Galveston for several years. No one saw Hill fall, and there is no direct testimony as to how he fell, his position just before the fall, or what caused it. No one testifies whether he went in between

the cars wholly or partially in his effort to uncouple. No one testifies whether the lever worked hard or easy at that moment. An inspection afterwards showed that the coupling apparatus was in good condition and worked easy. The coupling apparatus was automatic; the Santa Fe car being equipped with a Trojan coupler, and the T. & N. O. car with a Janney coupler. Each had a lever extending to near the side of the car, which, when in perfect order, could be raised with the hand without going between the cars; but the evidence was conflicting as to whether it could be raised without leaning toward the cars, and putting the arm and part of the body in such a position as to be struck if the speed of the train was suddenly increased. There was also testimony to the effect that frequently coupling apparatus in apparently perfect condition would work hard, and require considerable force to lift the lever, and that in such case more of the body would be put between the cars in the effort to lift it. The evidence is practically undisputed that the kick signal was given and obeyed about the time Hill undertook the uncoupling, and that no one knew his position or just what he was doing at that time. It is also true that the signal was given without warning to him, and without knowledge that the uncoupling had been safely accomplished. It was shown that, if the slack of the train was extended, the cars could not have been uncoupled, as the tension would hold the pin tightly in place, and that a back-up signal was necessary in order to loosen the tension; but the evidence is conflicting as to whether the slowing of the train had not effected this. There is a difference between a back-up signal and a kick signal. The back-up signal means that the engineer shall back the train. A kick signal means that the speed shall be sufficiently increased to throw the cut off into the side track by the force of the increased momentum, without following the car into the switch with the rest of the train. The signal given by Fewell and transmitted to the engineer was a kick signal. Hill knew that the car was to be kicked when cut off, and that the kick signal was necessary, and should be given by some one. The main point of conflict in the evidence is whether his coemployees should not have waited for him to give it, or notified him that it would be given by another than himself. Another point of conflict is whether, if another gave it, he should have appraised himself that Hill was safe before he gave it. Defendant adduced evidence to show that it was the custom in the Galveston yards of defendant to give the kick signal without reference to the position of the man doing the uncoupling, and that Hill knew of this custom, and should have expected the signal and increased speed of the train, and should have been prepared for it. There was evidence, also, that this was the general method and custom in switching with automatic couplers. On the other hand, there was evidence that the general method was to await a signal from the



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man who was doing the uncoupling, as he was the man in danger, and the only one who could know when the work was safely done. The circumstances also showed that there was no obstruction between Hill and Fewell, and that, if he had been looking, he could have seen the signal; but there was also evidence to the effect that his attention should have been fixed on the task before him, and that, as the signal should have been given by him, he need not have looked out for a signal which he had no reason to expect. It was shown that the acts of Fewell made no change in the programme as to the kicking of the car, as the kick signal must have been given at some time during the progress of the work in order to accomplish the end desired.

“By the eleventh assignment of error the following portion of the court’s charge is assailed: ‘If from the evidence you believe that a programme had been arranged between Hill and the other employees of defendant in the switch crew for the switching of the car, and that under said programme the said Hill knew that at or about the time he went to uncouple the car the train would be put in backward motion and started backwards for the purpose of giving the end car a kick, that it might roll into the side track, and that such was the usual and customary method at the Galveston yards of doing the work, and that said Hill knew of such fact, if any, and knew when he went to do the work that said car would be kicked in said manner without signal from or notice to him, and that, notwithstanding such knowledge on the part of Hill, he put himself in a position to be struck by the backward movement of the train, if any, if you so find the facts, you will return your verdict for defendant, as in such state of facts he would have assumed the risk of such backward movement.’ The defenses were nowhere submitted disjunctively. We sustained the assignment because the part of the charge complained of conjunctively submitted several matters of defense, so that the jury were required to believe all of them to have been established in order to find for defendant on the issue of assumed risk. In so holding, we followed the case of *Railway Co. v. Conroy*, 83 Tex. 214, 18 S. W. 609. In *Kershner v. Latimer*, 64 S. W. 237, the court of civil appeals at Dallas also followed the case cited. This court recently applied the same rule in the case of *Oil Co. v. Burow*, 68 S. W. —, 4 Tex. Ct. Rep. 867. When we decided the question, our attention had not been called to the cases of *Railway Co. v. Brown*, 78 Tex. 402, 14 S. W. 1034, and *Railway v. Wood*, 69 Tex. 679, 7 S. W. 372.

“In view of the apparent conflict between these cases, we respectfully certify for your decision:

“(1) Was the portion of the charge complained of such affirmative error as to require a reversal in the absence of a special charge requesting the submission of the defenses disjunctively?

“(2) If error, was it cured by the following special charge given at the request of plaintiffs: ‘You are instructed that if you believe from the evidence that J. H. Hill knew, or by the exercise of ordinary care must have known, that the train of cars was to be backed up forcibly, without waiting for a signal from him to that effect, or without notice to him that it would be so backed up, then he assumed the risk of such injury, and the plaintiffs would not be entitled to recover, and in such event your verdict should be for defendant.’

“On the issue of the proper method of doing the work in which deceased and his coemployees were engaged at the time of the accident, and as to the custom of the Galveston yards, evidence was admitted as to the custom prevailing in the yards of railway companies generally; and the evidence of plaintiffs’ witnesses tended to show that the custom in other yards differed from the custom alleged by defendant as prevailing in its yards at Galveston, and was safer. Upon this phase of the case the defendant requested the following special charge, which the court refused to give: ‘You are charged that if you believe there was a general practice with the yard crews in the matter of giving signals, and who should give them, in doing the work in the defendant’s yard, and a method of work known and usual with the switching crews in question, and if you further believe from the evidence that in some other yards, or with some other railroad employees, there was a different practice in vogue with reference to who should give signals, and how the work should be done, you are charged that it is immaterial in this case how the work may have been done in any other yard, and in such case you will not consider the testimony as to what may have been the practice in any other yards; and, if you believe from the evidence that there was a general habit and custom of doing the work in the defendant’s yard, then, unless the plaintiff has established by a fair preponderance of the testimony that the signals given by Foreman McCarty and by the yard master, Fewell, were not the proper and customary signals to be given at that time, then you will find for the defendant, without regard to any other issue in the case, and so say by your verdict.’ No charge was given limiting the effect of the testimony in case the jury should find the existence of the custom in the Galveston yard as alleged by defendant. We held it was error to refuse it.

“Third Question. Did the court err in refusing to give the requested instruction?

“The evidence adduced by plaintiff was of such a nature as to require a charge on the issue of contributory negligence and assumed risk, even if the defendant had offered no proof, but was not of such a character as to authorize the trial court to charge that the defenses were established as a matter of law. In the light of *Railway Co. v. Geiger*, 79 Tex. 21, 15 S. W. 214; *Same v. Reed*, 88 Tex. 439, 31 S. W. 1058; Rail-

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road Co. v. Martin (Tex. Civ. App.) 63 S. W. 1089; and Railroad Co. v. Allbright (Tex. Civ. App.) 26 S. W. 250,—we held that it was misleading to impose the burden of proof on defendant, as it might induce the jury to look alone to the testimony offered by defendant in support of the issue. The defendant did not request an instruction advising the jury that they might look to all the testimony for evidence upon the issue, and no such charge was given.

“Fourth Question. Did we err in so holding?

“We have mentioned that plaintiffs’ case is one of merit, that the verdict on the issue of liability is supported by the evidence, and that the judgment ought to be permitted to stand unless the matters above presented constitute material error.”

We answer the first question in the negative. The charge of the court stated a correct proposition of law, and nothing appears which indicates that the jury was probably misled by it. Railway Co. v. Wood, 69 Tex. 679, 7 S. W. 372; Railway Co. v. Brown, 78 Tex. 402, 14 S. W. 1034. The case of Railway Co. v. Conroy, 83 Tex. 216, 18 S. W. 609, seems to be in conflict with the two cases cited; but the report of the case is so meager, and the opinion of the court so indefinite, that we are unable to determine upon what ground the decision is based. We do not believe that it was the intention to overrule the cases before cited. However that may be, we are satisfied with the rule announced in Railway Co. v. Wood and Railway Co. v. Brown.

The second question need not be answered.

To the third question we answer, there was no error in refusing the charge requested. The effect of the charge would have been to place the burden upon the plaintiffs to prove that the signals given were not in compliance with any custom upon that subject which prevailed in the Galveston yards, whether reasonably safe or not, and without regard to the knowledge of the deceased of the existence of such custom. The custom could not affect plaintiff’s rights unless deceased knew of its existence, or was chargeable with notice of it. Railway Co. v. Hinzle, 82 Tex. 628, 18 S. W. 681.

We answer the fourth question in the negative. If the plaintiffs’ evidence made it necessary that they should explain the conduct of the deceased, to exculpate him from the charge of contributory negligence, it was improper for the court to charge the jury that the burden of proof was upon the defendant to establish the defense of contributory negligence, because such charge was calculated to lead the jury to believe that they should consider alone the evidence offered by the defendant upon that issue. Railway Co. v. Reed, 88 Tex. 447, 31 S. W. 1058.

**ST. LOUIS & S. F. RY. CO. *et al.* v. BRICKER.***(Supreme Court of Kansas, Division No. 1, July 5, 1902.)*

[69 Pac. Rep. 328.]

**Injury to Employee—Damages—Findings.**

In an action to recover damages for personal injuries, loss of ability to earn a livelihood and permanent injuries constitute one item of damages. Where, however, the defendants in such action, in their special questions submitted to the jury, divide such item, and ask the jury: (1) "If you find for the plaintiff, how much do you allow him for the loss of ability to earn a livelihood?" (2) "If you find for the plaintiff, how much do you allow for permanent injuries, exclusive of the amount, if any, allowed for loss of ability to earn a livelihood?"—and the jury, in response to such questions, states a given amount for each, they cannot thereafter be heard to say that, because the item was thus divided, the amount allowed in answer to one of such questions includes all the plaintiff was entitled to as damages for personal injuries and loss of ability to earn a livelihood, and that the amount allowed in answer to the other question is excessive.

**Same—Liability When Road Is in Possession of Receiver.\***

Where the property of a railway corporation is in the exclusive possession of receivers, who are operating the road, the corporation is not liable in an action for personal injuries sustained by an employee of such receivers.

**Same—Same—Joinder of Parties.**

If an action is prosecuted jointly against a railway corporation in the hands of receivers and the receivers to recover damages for personal injuries sustained by an employee, and it shall be determined that the receivers were in the exclusive possession of and operating the road at the time of the injuries, and that the corporation is not liable therefor, the action may be dismissed as to the corporation, or the judgment against the corporation set aside, without prejudice to the right of the plaintiff to have judgment against the receivers.

*(Syllabus by the Court.)*

**Error from district court, Sumner county; W. T. McBride, Judge.**

**Action by Ulysses Bricker against the St. Louis & San Francisco Railway Company and Aldace F. Walker and John J. McCook, receivers. Judgment for plaintiff, and defendants bring error. Modified.**

**Argued before JOHNSTON, CUNNINGHAM, GREENE, and ELLIS, JJ.**

**J. W. Gleed, J. L. Hunt, W. Littlefield (D. E. Palmer and Gleed, Ware & Gleed, of counsel), for plaintiffs in error.**

**J. D. Houston and C. R. Mitchell, for defendant in error.**

**GREENE, J.** Ulysses Bricker sued the St. Louis & San Francisco Railway Company and Aldace F. Walker and John J. McCook, as receivers of said company, to recover damages for injuries which he claims to have sustained by reason of the negligence of the employees of said company and its receivers. At the time of his injuries, plaintiff belonged to a

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\*See *Archambeau v. New York & N. E. R. Co.*, 11 Am. & Eng. R. Cas., N. S., 706, and note, 707 et seq.

St. Louis & S. F. Ry. Co. v. Bricker

bridge gang working under a foreman named Bowersock, repairing and reconstructing a pile bridge on a line of defendants' railroad in Ellsworth county. The bridge was situated in a southwesterly and northeasterly direction over a stream, and was about 32 feet long. Immediately before the plaintiff received his injuries, he was under the northeast end of the bridge, removing the nuts from the blocks which held two of the stringers of the old bridge. The bottom of the stringers was about 14 inches from the ground at the place where he was working. While he was thus engaged the workmen on top of the bridge rolled a push car loaded with timbers onto the southwest end of the bridge, and threw one of the timbers off at that end, on the north side. Bowersock, the foreman, was standing on the bridge directly over where plaintiff was working. The push car was then rolled to the northeast end of the bridge for the purpose of throwing another timber off at that end. Just immediately preceding, or as the men were in the act of throwing this latter timber, Bowersock called to plaintiff to "Look out" or "Get out." The plaintiff, hearing this call, undertook to get out from under the bridge, and, as he did so, was caught by the falling timber, which crushed his leg, and caused the injuries of which complaint is made. It is alleged that plaintiff's injuries were sustained by the negligent acts of defendants' employees,—especially that of Bowersock in directing the plaintiff to work at the time and place where the injuries occurred; in failing to instruct him of the hazard of the situation; negligently failing to look out for his safety, and to use ordinary precaution for his protection from impending danger; in failing to inform the other workmen of the position of plaintiff under the bridge; and in negligently failing to notify plaintiff in time to escape the danger which might result to him from throwing the timber.

The first contention on the part of plaintiffs in error is that Bricker was guilty of contributory negligence; that he was in a place of absolute safety, had he remained at his place under the bridge; that his negligence consisted in leaving a place of safety, and unnecessarily putting himself in the way of the falling timber. It was not denied by the plaintiff that the timber could not have fallen on him had he remained under the bridge. There is considerable undisputed evidence in the record, however, that the falling timber was not the only danger against which he had to guard. There is evidence that in constructing and repairing bridges there are constantly in use many tools, such as adzes, mauls, and packing rings, which are generally kept on the top of the bridge, and the throwing of timbers will, or is likely to, jar these tools off the bridge, and there is danger of them falling on the workmen beneath. The evidence also fairly established the fact that Bowersock, the foreman, had instructed his men never to throw a timber from a bridge while men were under it at the point from which the timber is thrown. This was to guard against injury resulting

## St. Louis &amp; S. F. Ry. Co. v. Bricker

from the falling of these tools. The evidence is that it was the universal custom of that gang not to throw a timber while workmen were under the bridge. This instruction and custom were known to the plaintiff, and he testified that he relied and acted upon them in this instance, and that, when Bowersock called to him to "Look out" or "Get out," he understood that Bowersock intended he should come out from under the bridge, and that the men would not throw the timber until he had time to do so. He also testified that he did not get from under the bridge because of any danger from the timber, but because the jar which the bridge would receive from the falling timber would likely dislodge the tools on the bridge, and he would thus get hurt. This testimony went to the jury uncontradicted.

Another alleged error is the exclusion of certain testimony offered by the plaintiffs in error on an application to require the plaintiff to give security for costs. On an examination of this evidence, it must be held that the court committed no error in this respect.

At the trial the defendant submitted to the jury the following special interrogatories: "No. 52. If you find for the plaintiff, how much do you allow him for the loss of ability to earn a livelihood? Ans. Three thousand dollars. No. 53. If you find for the plaintiff, how much do you allow for the permanent injuries, exclusive of the amount, if any, allowed for the loss of ability to earn a livelihood? Ans. Three thousand dollars." It is contended by plaintiffs in error that the jury having allowed the plaintiff \$3,000 for permanent injuries, which generally includes the loss of ability to earn a livelihood, the \$3,000 allowed for loss of ability to earn a livelihood is excessive. We think it true that generally an allowance for permanent injuries includes loss of ability to earn a livelihood, but in this instance the plaintiffs in error requested the jury to divide this item into two parts, and, unless the court can say that the aggregate amount is excessive, the plaintiffs in error have cause to complain.

Another contention is made that the award of \$2,000 for loss of time is grossly excessive. It was more than five years from the date of the injuries to the time of the trial. The plaintiff was earning \$1.75 a day when injured. The jury, after hearing the evidence and seeing the plaintiff, was the judge as to what extent his injuries disabled him, what he could probably have earned in his disabled condition, and what he would probably have earned during this time had he not been injured. The finding was approved by the trial court, whose opportunities to arrive at a reasonably correct conclusion were equal to those of the jury. In view of these facts, this court cannot say that the award is excessive.

A contention is made by the corporation that in no event is it liable. It appears that at the time the plaintiff received his injuries, and for some time prior thereto, all the property



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of the corporation was in the hands of, and the road was being operated by, Aldace F. Walker and John J. McCook as receivers. The principle of respondeat superior has no application. The receivers were the officers of the court, and not the agents of the corporation. The corporation is not, therefore, liable for the acts of the receivers or the acts of their employees. *Railway Co. v. McFadden*, 89 Tex. 138, 33 S. W. 853; *Metz v. Railroad Co.*, 58 N. Y. 61, 17 Am. Rep. 201; *Railroad Co. v. Davis*, 23 Ind. 553, 85 Am. Dec. 477; *Gableman v. Railway Co. (C. C.)* 20 Am. & Eng. R. Cas., N. S., 505, 82 Fed. 790; *Warax v. Railway Co. (C. C.)* 72 Fed. 637; *Railroad Co. v. Hoechner*, 14 C. C. A. 469, 67 Fed. 456; *Railway Co. v. Smith*, 59 Kan. 80, 52 Pac. 102. Again, the liability of a railroad company for injuries sustained by an employee is one created by the statute. Section 5858, Gen. St. 1901, reads: "Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees to any person sustaining such damage." It will be observed that the damages for which the corporation is made liable must arise in consequence of some negligence of the agents of the corporation or mismanagement of its engineers or other employees. The plaintiff, when injured, was not an employee of the corporation, and his injuries are not the result of the negligent act of any agent of the corporation, or of the mismanagement of any engineer or employee of the corporation.

It is argued by the receivers and the corporation that because they were sued jointly, and a joint judgment taken against both, if it should be held that the corporation is not liable the judgment cannot stand as to either. This contention cannot be sustained. This court has expressed itself upon this question in *Railway Co. v. Smith*, 59 Kan. 80, 52 Pac. 102. With the rule there stated, we heartily agree.

The judgment of the court below is modified and set aside as to the corporation, and affirmed as to the receivers. The costs in this court are equally divided. All the justices concurring.

JOHNSON *v.* SOUTHERN PAC. CO.

(*Circuit Court of Appeals, Eighth Circuit, August 28, 1902.*)

[117 Fed. Rep. 462.]

**Automatic Couplers**—Act of March 2, 1893, Does Not Require Locomotives to Be Equipped with.

The act of March 2, 1893 (27 Stat. c. 196, p. 531), does not make it unlawful for common carriers to use locomotives engaged in interstate commerce which are not equipped with automatic couplers.

**Construction of Statutes**—Act Changing Common Law Strictly Construed.

A statute changing the common law modifies or abrogates it no farther than the clear import of its language necessarily requires.

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**Same—Penal Statute Strictly Construed.**

A penal statute may not be so broadened by construction as to make it cover, and authorize the punishment of, otherwise lawful acts, which are not denounced by the usual meaning of its express terms.

**Same—Enumeration of Subjects Excludes Others.**

A statute which enumerates the parties, things, or acts which it denounces thereby impliedly excludes all others from its effect.

**Same—When Not Permissible.**

When the language of a statute is unambiguous, and its meaning is plain, it must be held to mean, and the legislative body must be held to have intended, what it plainly expresses, and no room is left for construction.

**Injury to Servant—Negligence—Assumption of Risk.**

A servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to one of his experience, age, and capacity by the use of ordinary care.

**Same—Assumption of Risk of Coupling Cars with Different Couplers.\***

A brakeman of ordinary intelligence and experience assumes the risks and dangers of coupling cars provided with different kinds of well-known couplers, bumpers, and deadwoods, because these are the ordinary risks and dangers of his service.

**Same—Automatic Couplers—Act of March 2, 1893—Equipment of Car with One Kind of Couplers Sufficient.**

The equipment, under the act of March 2, 1893, of a car with automatic couplers which will couple automatically with those of the same kind or make, is a compliance with the statute. It does not require cars used in interstate commerce to be equipped with couplers which will couple automatically with cars equipped with automatic couplers of other makes.

**Same—When Car Is Used in Moving Interstate Traffic.**

Cars loaded with articles shipped to other states, and started, whether in yards, on side tracks, or in trains, are used in moving interstate traffic. But vacant cars in yards, on side tracks, in repair shops, or in trains which are not loaded with, or in use to move articles of, interstate commerce, do not fall within the terms or meaning of the act of March 2, 1893. A dining car standing empty on a side track at an intermediate station, where it had been left by a train engaged in interstate traffic until it should be taken by another train engaged in the same traffic, going in the opposite direction, and which the owner intended to use in interstate traffic was drawn by a freight engine from the side track to the turntable, turned, and placed again upon the side track: *held*, that the car was not used in moving interstate traffic while it was on the side track and while it was being turned.

Thayer, J., dissenting in part.

(Syllabus by the Court.)

**In Error to the Circuit Court of the United States for the District of Utah.**

This is an action for damages for a personal injury, in which the court instructed the jury to return a verdict for the defendant upon this state of facts: The defendant was operating passenger trains between San Francisco, in the state of California, and Ogden, in the state of Utah. It was in the habit of drawing a dining car in these trains. Such a car formed a part of a train leaving San Francisco, and ran through to Ogden, where it was ordinarily turned and put into a train going

\*See generally, foot-note appended to Southern Pac. Co. v. Winton (Tex.), 3 R. R. R. 358, 26 Am. & Eng. R. Cas., N. S., 358.

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west to San Francisco. On August 5, 1900, the east-bound train was so late that it was not practicable to get the dining car into Ogden in time to place it in the next west-bound train, and it was therefore left on a side track at Promontory, in the state of Utah, to be picked up by the west-bound train when it arrived. While it was standing on this track the conductor of a freight train which arrived there was directed to take this dining car to a turntable, turn it, and place it back upon the side track, so that it would be ready to return to San Francisco. The conductor instructed his crew to carry out this direction. The plaintiff, Johnson, was the head brakeman, and he undertook to couple the engine to the dining car for the purpose of carrying out the order of the conductor. The freight engine was equipped with a Janney coupler, which would couple automatically with another Janney coupler, and the dining car was provided with a Miller hook or Miller coupler, which would couple automatically with another Miller hook; but the Miller hook would not couple automatically with the Janney coupler, because it was on the same side, and would pass over it. Johnson knew this, and undertook to make the coupling by means of a link and pin. He knew that it was a difficult coupling to make, and that it was necessary to go between the engine and the car to accomplish it, and that it was dangerous to do so. Nevertheless he went in between the engine and the car, and tried to make the coupling three times, without objection or protest. He failed twice, and the third time his hand was caught and crushed so that it became necessary to amputate his arm above the wrist.

W. L. Maginnis, for plaintiff in error.

Henry G. Herbel (Martin L. Clardy, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Under the common law the plaintiff assumed the risks and dangers of the coupling which he endeavored to make, and for that reason he is estopped from recovering the damages which resulted from his undertaking. He was an intelligent and experienced brakeman, familiar with the couplers he sought to join, and with their condition, and well aware of the difficulty and danger of his undertaking, so that he falls far within the familiar rules that the servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to one of his age, experience, and capacity by the use of ordinary care, and that the risks and dangers of coupling cars provided with different kinds of well-known couplers, bumpers, brakeheads, and deadwoods are the ordinary risks and dangers of a brakeman's service. *Manufacturing Co. v.*

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Erickson, 55 Fed. 943, 946, 5 C. C. A. 341, 343; Railroad Co. v. Blake, 27 U. S. App. 190, 194, 11 C. C. A. 93, 95, 63 Fed. 45, 47; King v. Morgan, 48 C. C. A. 507, 511, 109 Fed. 446, 450; Gold Mines v. Hopkins, 111 Fed. 298, 304, 49 C. C. A. 347, 353; Railroad Co. v. McDade, 135 U. S. 554, 570, 10 Sup. Ct. 1044, 34 L. Ed. 235; Railroad Co. v. Seley, 152 U. S. 145, 152, 14 Sup. Ct. 530, 38 L. Ed. 391; Kohn v. McNulta, 147 U. S. 238, 241, 13 Sup. Ct. 298, 37 L. Ed. 150; Railroad Co. v. Voight, 176 U. S. 498, 120 Sup. Ct. 385, 44 L. Ed. 560; Sweeney v. Envelope Co., 101 N. Y. 520, 5 N. E. 358, 54 Am. St. Rep. 722; Railway Co. v. Smithson, 45 Mich. 212, 7 N. W. 791; Hodges v. Kimball, 44 C. C. A. 193, 104 Fed. 745; Whitcomb v. Oil Co. (Ind. Sup.) 55 N. E. 440, 442; Boland v. Railroad Co. (Ala.) 18 South. 99.

This proposition is not seriously challenged, but counsel base their claim for a reversal of the judgment below upon the position that the plaintiff was relieved of this assumption of risk, and of its consequences by, the provisions of the act of congress of March 2, 1893 (27 Stat. c. 196, p. 531). The title of that act, and the parts of it that are material to the consideration of this contention, are these:

"An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes and for other purposes.

"Section 1. That from and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train brake system. \* \* \*

"Sec. 2. That on and after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

"Sec. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act shall be liable to a penalty of one hundred dollars for each and every such violation. \* \* \*"

"Sec. 8. That any employee of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

The first thought that suggests itself to the mind upon a

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perusal of this law, and a comparison of it with the facts of this case, is that this statute has no application here, because both the dining car and the engine were equipped as this act directs. The car was equipped with Miller couplers which would couple automatically with couplers of the same construction upon cars in the train in which it was used to carry on interstate commerce, and the engine was equipped with a power driving wheel brake such as this statute prescribes. To overcome this difficulty, counsel for the plaintiff persuasively argued that this is a remedial statute; that laws for the prevention of fraud, the suppression of a public wrong, and the bestowal of a public good are remedial in their nature, and should be liberally construed, to prevent the mischief and to advance the remedy, notwithstanding the fact that they may impose a penalty for their violation; and that this statute should be so construed as to forbid the use of a locomotive as well as a car which is not equipped with an automatic coupler. In support of this contention he cites Suth. St. Const. § 360; Wall v. Platt, 169 Mass. 398, 48 N. E. 270; Taylor v. U. S., 3 How. 197, 11 L. Ed. 559; and other cases of like character. The general propositions which counsel quote may be found in the opinions in these cases, and in some of them they were applied to the particular facts which those actions presented. But the interpolation in this act of congress by construction of an ex post facto provision that it is, and ever since January 1, 1898, has been, unlawful for any common carrier to use any engine in interstate traffic that is or was not equipped with couplers coupling automatically, and that any carrier that has used or shall use an engine not so equipped has been and shall be liable to a penalty of \$100 for every violation of this provision, is too abhorrent to the sense of justice and fairness, too rank and radical a piece of judicial legislation, and in violation of too many established and salutary rules of construction, to commend itself to the judicial reason or conscience. The primary rule for the interpretation of a statute or a contract is to ascertain, if possible, and enforce, the intention which the legislative body that enacted the law, or the parties who made the agreement, have expressed therein. But it is the intention expressed in the law or contract, and that only, that the courts may give effect to. They cannot lawfully assume or presume secret purposes that are not indicated or expressed by the statute itself and then enact provisions to accomplish these supposed intentions. While ambiguous terms and doubtful expressions may be interpreted to carry out the intention of a legislative body which a statute fairly evidences, a secret intention cannot be interpreted into a statute which is plain and unambiguous, and which does not express it. The legal presumption is that the legislative body expressed its intention, that it intended what it expressed, and that it intended nothing more. U. S. v. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37; Insurance Co. v. Chaplin (C. C. A.)

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116 Fed. 858; Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co. (C. C. A.) 114 Fed. 77. 81; Railway Co. v. Bagley, 60 Kan. 424, 431, 56 Pac. 759; Woolsey v. Ryan, 59 Kan. 601, 54 Pac. 664; Davie v. Mining Co., 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357; Vogel v. Pekoc, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; Campbell v. Lambert, 36 La. Ann. 35, 51 Am. Rep. 1; Turnpike Co. v. Coy, 13 Ohio St. 84; Stensgaard v. Smith, 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205. Construction and interpretation have no place or office where the terms of a statute are clear and certain, and its meaning is plain. In such a case they serve only to create doubt and to confuse the judgment. When the language of a statute is unambiguous, and its meaning evident, it must be held to mean what it plainly expresses, and no room is left for construction. Swarts v. Siegel (C. C. A.) 117 Fed. 13; Knox Co. v. Morton, 15 C. C. A. 671, 673, 68 Fed. 787, 789; Railway Co. v. Sage, 17 C. C. A. 558, 565, 71 Fed. 40, 47; U. S. v. Fisher, 2 Cranch, 358, 399, 2 L. Ed. 304; Railway Co. v. Phelps, 137 U. S. 528, 536, 11 Sup. Ct. 168, 24 L. Ed. 767.

This statute clearly prohibits the use of any engine in moving interstate commerce not equipped with a power driving wheel brake, and the use of any car not equipped with automatic couplers, under a penalty of \$100 for each offense; and it just as plainly omits to forbid, under that or any penalty, the use of any car which is not equipped with a power driving wheel brake, and the use of any engine that is not equipped with automatic couplers. This striking omission to express any intention to prohibit the use of engines unequipped with automatic couplers raises the legal presumption that no such intention existed, and prohibits the courts from importing such a purpose into the act, and enacting provisions to give it effect. The familiar rule that the expression of one thing is the exclusion of other points to the same conclusion. Section 2 of the act does not declare that it shall be unlawful to use any engine or car not equipped with automatic couplers, but that it shall be unlawful only to use any car lacking this equipment. This clear and concise definition of the unlawful act is a cogent and persuasive argument against the contention that the use without couplers of locomotives, hand cars, or other means of conducting interstate traffic, was made a misdemeanor by this act. Where the statute enumerates the persons, things, or acts affected by it, there is an implied exclusion of all others. Suth. St. Const. § 227. And when the title of this statute and its first section are again read; when it is perceived that it was not from inattention, thoughtlessness, or forgetfulness; that it was not because locomotives were overlooked or out of mind, but that it was advisedly and after careful consideration of the equipment which they should have, that congress forbade the use of cars alone without automatic couplers; when it is seen that the title of the act is to compel common carriers to "equip their cars with automatic



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couplers \* \* \* and their locomotives with driving wheel brakes''; that the first section makes it unlawful to use locomotives not equipped with such brakes, and the second section declares it to be illegal to use cars without automatic couplers,—the argument becomes unanswerable and conclusive.

Again, this act of congress changes the common law. Before its enactment, servants coupling cars used in interstate commerce without automatic couplers assumed the risk and danger of that employment, and carriers were not liable for injuries which their employees suffered in the discharge of this duty. Since its passage the employees no longer assume this risk, and, if they are free from contributory negligence, they may recover for the damages they sustain in this work. A statute which thus changes the common law must be strictly construed. The common or the general law is not further abrogated by such a statute than the clear import of its language necessarily requires. *Shaw v. Railroad Co.*, 101 U. S. 557, 565, 25 L. Ed. 892; *Fitzgerald v. Quann*, 109 N. Y. 441, 445, 17 N. E. 354; *Brown v. Barry*, 3 Dall. 365, 367, 1 L. Ed. 638. The language of this statute does not require the abrogation of the common law that the servant assumes the risk of coupling a locomotive without automatic couplers with a car which is provided with them.

Moreover, this is a penal statute, and it may not be so broadened by judicial construction as to make it cover and permit the punishment of an act which is not denounced by the fair import of its terms. The acts which this statute declares to be unlawful, and for the commission of which it imposes a penalty, were lawful before its enactment, and their performance subjected to no penalty or liability. It makes that unlawful which was lawful before its passage, and it imposes a penalty for its performance. Nor is this penalty a mere forfeiture for the benefit of the party aggrieved or injured. It is a penalty prescribed by the statute, and recoverable by the government. It is, therefore, under every definition of the term, a penal statute. The act which lies at the foundation of this suit—the use of a locomotive which was not equipped with a Miller hook to turn a car which was duly equipped with automatic couplers—was therefore unlawful or lawful as it was or was not forbidden by this statute. That act has been done. When it was done it was neither forbidden nor declared to be unlawful by the express terms of this law. There is no language in it which makes it unlawful to use in interstate commerce a locomotive engine which is not equipped with automatic couplers. The argument of counsel for the plaintiff is, however, that the statute should be construed to make this act unlawful because it falls within the mischief which congress was seeking to remedy, and hence it should be presumed that the legislative body intended to denounce this act as much as that which it forbade by the

terms of the law. An ex post facto statute which would make such an innocent act a crime would be violative of the basic principles of Anglo-Saxon jurisprudence. An ex post facto construction which has the same effect is equally abhorrent to the sense of justice and of reason. The mischief at which a statute was leveled, and the fact that other acts which it does not denounce are within the mischief, and of equal atrocity with those which it forbids, do not raise the presumption that the legislative body which enacted it had the intention, which the law does not express, to prohibit the performance of the acts which it does not forbid. Nor will they warrant a construction which imports into the statute such a prohibition. The intention of the legislature and the meaning of a penal statute must be found in the language actually used, interpreted according to its fair and usual meaning, and not in the evils which it was intended to remedy, nor in the assumed secret intention of the lawmakers to accomplish that which they did not express. *U. S. v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37; *Sarlls v. U. S.*, 152 U. S. 570, 14 Sup. Ct. 720, 38 L. Ed. 556; *U. S. v. Harris*, 177 U. S. 305, 309, 20 Sup. Ct. 609, 44 L. Ed. 780; *Suth. St. Const.* § 208. The decision and opinion of the supreme court in *U. S. v. Harris*, 177 U. S. 305, 309, 20 Sup. Ct. 609, 44 L. Ed. 780, is persuasive—nay, it is decisive—in the case before us. The question there presented was analogous to that here in issue. It was whether congress intended to include receivers managing a railroad among those who were prohibited from confining cattle, sheep, and other animals in cars more than 28 consecutive hours without unloading them for rest, water, and feeding, under “An act to prevent cruelty to animals while in transit by railroad or other means of transportation,” approved March 3, 1873, and published in the Revised Statutes as sections 4386, 4387, 4388, and 4389. This statute forbids the confinement of stock in cars by any railroad company engaged in interstate commerce more than 28 consecutive hours, and prescribes a penalty of \$500 for a violation of its provisions. The plain purpose of the act was to prohibit the confinement of stock while in transit for an unreasonable length of time. The confinement of cattle by receivers operating a railroad was as injurious as their confinement by a railroad company, and the argument for the United States was that, as such acts committed by receivers were plainly within the mischief congress was seeking to remedy, the conclusion should be that it intended to prohibit receivers, as well as railroad companies, from the commission of the forbidden acts, and hence that receivers were subject to the provisions of the law. The supreme court conceded that the confinement of stock in transit was within the mischief that congress sought to remedy. But it held that as the act did not, by its terms, forbid such acts when committed by receivers, it could not presume the intention of congress to

do so, and import such a provision into the plain terms of the law. Mr. Justice Shiras, who delivered the unanimous opinion of the court, said:

“Giving all proper force to the contention of the counsel for the government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute.”

He cited with approval the decision of the supreme court in *Sarlls v. U. S.*, 152 U. S. 570, 575, 14 Sup. Ct. 720, 38 L. Ed. 556, to the effect that lager beer was not included within the meaning of the term “spirituous liquors” in the penal statute found in section 2139 of the Revised Statutes, and closed the discussion with the following quotation from the opinion of Chief Justice Marshall in *U. S. v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37:

“The rule that penal statutes are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, and not in the judicial, department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. But this is not a new, independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this: that, though penal statutes are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be applied so as to narrow the words of the statute, to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature ordinarily used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words,—especially in a penal act,—in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far

as to punish a crime not enumerated in the statute, because it is of equal atrocity or of a kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule in other cases."

The act of March 2, 1893, is a penal statute, and it changes the common law. It makes that unlawful which was innocent before its enactment, and imposes a penalty, recoverable by the government. Its terms are plain and free from doubt, and its meaning is clear. It declares that it is unlawful for a common carrier to use in interstate commerce a car which is not equipped with automatic couplers, and it omits to declare that it is illegal for a common carrier to use a locomotive that is not so equipped. As congress expressed in this statute no intention to forbid the use of locomotives which were not provided with automatic couplers, the legal presumption is that it had no such intention, and provisions to import such an intention into the law and to effectuate it may not be lawfully enacted by judicial construction. The statute does not make it unlawful to use locomotives that are not equipped with automatic couplers in interstate commerce, and it did not modify the rule of the common law under which the plaintiff assumed the known risk of coupling such an engine to the dining car.

There are other considerations which lead to the same result. If we are in error in the conclusion already expressed, and if the word "car," in the second section of this statute, means locomotive, still this case does not fall under the law, (1) because both the locomotive and the dining car were equipped with automatic couplers; and (2) because at the time of the accident they were not "used in moving interstate traffic."

For the reasons which have been stated, this statute may not be lawfully extended by judicial construction beyond the fair meaning of its language. There is nothing in it which requires a common carrier engaged in interstate commerce to have every car on its railroad equipped with the same kind of coupling, or which requires it to have every car equipped with a coupler which will couple automatically with every other coupler with which it may be brought into contact in the usual course of business upon a great transcontinental system of railroads. If the lawmakers had intended to require such an equipment, it would have been easy for them to have said so, and the fact that they made no such requirement raises the legal presumption that they intended to make none. Nor is the reason for their omission to do so far to seek or difficult to perceive. There are several kinds or makes of practical and efficient automatic couplers. Some railroad companies use one kind; others have adopted other kinds. Couplers of each kind will couple automatically with others of the same kind

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or construction. But some couplers will not couple automatically with couplers of different construction. Railroad companies engaged in interstate commerce are required to haul over their roads cars equipped with all these couplers. They cannot relieve themselves from this obligation or renounce this public duty for the simple reason that their cars or locomotives are not equipped with automatic couplers which will couple with those with which the cars of other roads are provided, and which will couple with equal facility with those of their kind. These facts and this situation were patent to the congress when it enacted this statute. It must have known the impracticability of providing every car with as many different couplers as it might meet upon a great system of railroads, and it made no such requirement. It doubtless knew the monopoly it would create by requiring every railroad company to use the same coupler, and it did not create this monopoly. The prohibition of the statute goes no farther than to bar the handling of a car "not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the car." It does not bar the handling and use of a car which will couple automatically with couplers of its kind because it will not also couple automatically with couplers of all kinds, and it would be an unwarrantable extension of the terms of this law to import into it a provision to this effect. A car equipped with practical and efficient automatic couplers, such as the Janney couplers or the Miller hooks, which will couple automatically with those of their kind, fully and literally complies with the terms of the law, although these couplers will not couple automatically with automatic couplers of all kinds or constructions. The dining car and the locomotive were both so equipped. Each was provided with an automatic coupler which would couple with those of its kind, as provided by the statute, although they would not couple with each other. Each was accordingly equipped as the statute directs, and the defendant was guilty of no violation of it by their use.

Again, the statute declares it to be unlawful for a carrier "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped," etc. It is not, then, unlawful, under this statute, for a carrier to haul a car not so equipped which is either used in intrastate traffic solely, or which is not used in any traffic at all. It would be no violation of the statute for a carrier to haul an empty car not used to move any interstate traffic from one end of its railroad to the other. It would be no violation of the law for it to haul such a car in its yards, on its side track, to put it into its trains, to move it in any manner it chose. It is only when a car is "used in moving interstate traffic" that it becomes unlawful to haul it unless it is equipped as the statute prescribes. On the day of this accident the dining car in this

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**Same—Penal Statute Strictly Construed.**

A penal statute may not be so broadened by construction as to make it cover, and authorize the punishment of, otherwise lawful acts, which are not denounced by the usual meaning of its express terms.

**Same—Enumeration of Subjects Excludes Others.**

A statute which enumerates the parties, things, or acts which it denounces thereby impliedly excludes all others from its effect.

**Same—When Not Permissible.**

When the language of a statute is unambiguous, and its meaning is plain, it must be held to mean, and the legislative body must be held to have intended, what it plainly expresses, and no room is left for construction.

**Injury to Servant—Negligence—Assumption of Risk.**

A servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to one of his experience, age, and capacity by the use of ordinary care.

**Same—Assumption of Risk of Coupling Cars with Different Couplers.\***

A brakeman of ordinary intelligence and experience assumes the risks and dangers of coupling cars provided with different kinds of well-known couplers, bumpers, and deadwoods, because these are the ordinary risks and dangers of his service.

**Same—Automatic Couplers—Act of March 2, 1893—Equipment of Car with One Kind of Couplers Sufficient.**

The equipment, under the act of March 2, 1893, of a car with automatic couplers which will couple automatically with those of the same kind or make, is a compliance with the statute. It does not require cars used in interstate commerce to be equipped with couplers which will couple automatically with cars equipped with automatic couplers of other makes.

**Same—When Car Is Used in Moving Interstate Traffic.**

Cars loaded with articles shipped to other states, and started, whether in yards, on side tracks, or in trains, are used in moving interstate traffic. But vacant cars in yards, on side tracks, in repair shops, or in trains which are not loaded with, or in use to move articles of, interstate commerce, do not fall within the terms or meaning of the act of March 2, 1893. A dining car standing empty on a side track at an intermediate station, where it had been left by a train engaged in interstate traffic until it should be taken by another train engaged in the same traffic, going in the opposite direction, and which the owner intended to use in interstate traffic was drawn by a freight engine from the side track to the turntable, turned, and placed again upon the side track: *held*, that the car was not used in moving interstate traffic while it was on the side track and while it was being turned.

Thayer, J., dissenting in part.

(Syllabus by the Court.)

**In Error to the Circuit Court of the United States for the District of Utah.**

This is an action for damages for a personal injury, in which the court instructed the jury to return a verdict for the defendant upon this state of facts: The defendant was operating passenger trains between San Francisco, in the state of California, and Ogden, in the state of Utah. It was in the habit of drawing a dining car in these trains. Such a car formed a part of a train leaving San Francisco, and ran through to Ogden, where it was ordinarily turned and put into a train going

\*See generally, foot-note appended to Southern Pac. Co. v. Winton (Tex.), 3 R. R. R. 358, 26 Am. & Eng. R. Cas., N. S., 358.



## Johnson v. Southern Pac. Co

west to San Francisco. On August 5, 1900, the east-bound train was so late that it was not practicable to get the dining car into Ogden in time to place it in the next west-bound train, and it was therefore left on a side track at Promontory, in the state of Utah, to be picked up by the west-bound train when it arrived. While it was standing on this track the conductor of a freight train which arrived there was directed to take this dining car to a turntable, turn it, and place it back upon the side track, so that it would be ready to return to San Francisco. The conductor instructed his crew to carry out this direction. The plaintiff, Johnson, was the head brakeman, and he undertook to couple the engine to the dining car for the purpose of carrying out the order of the conductor. The freight engine was equipped with a Janney coupler, which would couple automatically with another Janney coupler, and the dining car was provided with a Miller hook or Miller coupler, which would couple automatically with another Miller hook; but the Miller hook would not couple automatically with the Janney coupler, because it was on the same side, and would pass over it. Johnson knew this, and undertook to make the coupling by means of a link and pin. He knew that it was a difficult coupling to make, and that it was necessary to go between the engine and the car to accomplish it, and that it was dangerous to do so. Nevertheless he went in between the engine and the car, and tried to make the coupling three times, without objection or protest. He failed twice, and the third time his hand was caught and crushed so that it became necessary to amputate his arm above the wrist.

W. L. Maginnis, for plaintiff in error.

Henry G. Herbel (Martin L. Clardy, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Under the common law the plaintiff assumed the risks and dangers of the coupling which he endeavored to make, and for that reason he is estopped from recovering the damages which resulted from his undertaking. He was an intelligent and experienced brakeman, familiar with the couplers he sought to join, and with their condition, and well aware of the difficulty and danger of his undertaking, so that he falls far within the familiar rules that the servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to one of his age, experience, and capacity by the use of ordinary care, and that the risks and dangers of coupling cars provided with different kinds of well-known couplers, bumpers, brakeheads, and deadwoods are the ordinary risks and dangers of a brakeman's service. *Manufacturing Co. v.*

not be held to come within the fair import of the terms of this law either because their owner intends to use them for that purpose at some future time, or because they have been or will be so used. Empty cars in repair shops, in yards, on side tracks, those in use to transport traffic within a state and for that purpose alone, are not in use to move articles of interstate commerce, and do not fall under the ban of this law. Neither the empty dining car standing upon the side track, nor the freight engine which was used to turn it at the little station in Utah, was then used in moving interstate traffic, within the meaning of this statute, and this case did not fall within the provisions of this law.

The judgment below must accordingly be affirmed, and it is so ordered.

THAYER, Circuit Judge. I am unable to concur in the conclusion, announced by the majority of the court, that the act of congress of March 2, 1893 (27 Stat. 531, c. 196), does not require locomotive engines to be equipped with automatic couplers; and I am equally unable to concur in the other conclusion announced by my associates that the dining car in question at the time of the accident was not engaged or being used in moving interstate traffic.

In my judgment, it is a very technical interpretation of the provisions of the act in question, and one which is neither in accord with its spirit nor with the obvious purpose of the law-maker, to say that congress did not intend to require engines to be equipped with automatic couplers. The statute is remedial in its nature; it was passed for the protection of human life; and there was certainly as much, if not greater, need that engines should be equipped to couple automatically, as that ordinary cars should be so equipped, since engines have occasion to make couplings more frequently. In my opinion, the true view is that engines are included by the words "any car," as used in the second section of the act. The word "car" is generic, and may well be held to comprehend a locomotive or any other similar vehicle which moves on wheels; and especially should it be so held in a case like the one now in hand, where no satisfactory reason has been assigned or can be given which would probably have influenced congress to permit locomotives to be used without automatic coupling appliances.

I am also of opinion that, within the fair intent and import of the act, the dining car in question at the time of the accident was being hauled or used in interstate traffic. The reasoning by which a contrary conclusion is reached seems to me to be altogether too refined and unsatisfactory to be of any practical value. It was a car which at the time was employed in no other service than to furnish meals to passengers between Ogden and San Francisco. It had not been taken out of that service, even for repairs or for any other use, when the accident occurred, but was engaged therein to the same extent



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that it would have been if it had been hauled through to Ogden, and if the accident had there occurred while it was being turned to make the return trip to San Francisco. The cars composing a train which is regularly employed in interstate traffic ought to be regarded as used in that traffic while the train is being made up with a view to an immediate departure on an interstate journey as well as after the journey has actually begun. I accordingly dissent from the conclusion of the majority of the court on this point.

While I dissent on the foregoing propositions, I concur in the other view which is expressed in the opinion of the majority, to the effect that the case discloses no substantial violation of the provisions of the act of congress, because both the engine and the dining car were equipped with automatic coupling appliances. In this respect the case discloses a compliance with the law, and the ordinary rule governing the liability of the defendant company should be applied. The difficulty was that the car and engine were equipped with couplers of a different pattern, which would not couple, for that reason, without a link. Janney couplers and Miller couplers are in common use on the leading railroads of the country, and congress did not see fit to command the use of either style of automatic coupler to the exclusion of the other, while it must have foreseen that, owing to the manner in which cars were ordinarily handled and exchanged, it would sometimes happen, as in the case at bar, that cars having different styles of automatic couplers would necessarily be brought in contact in the same train. It made no express provision for such an emergency, but declared generally that, after a certain date, cars should be provided with couplers coupling automatically. The engine and dining car were so equipped in the present instance, and there was no such violation of the provisions of the statute as should render the defendant company liable to the plaintiff by virtue of the provisions contained in the eighth section of the act. In other words, the plaintiff assumed the risk of making the coupling in the course of which he sustained the injury. On this ground I concur in the order affirming the judgment below.

## KANSAS CITY, M. &amp; B. R. CO. v. WAGAND.

(*Supreme Court of Alabama, June 28, 1902.*)

[32 So. Rep. 744.]

**Injury to Team Working on Track—Failure to Maintain Lookout.\***

Where plaintiff's mule was injured by defendant's train while

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\*See foot-note appended to *Kansas City, M. & B. R. Co. v. Henson* (Ala.), 1 R. R. R. 674, 24 Am. & Eng. R. Cas., N. S., 674; *Louisville & N. R. Co. v. Kice* (Ky.), 20 Am. & Eng. R. Cas., N. S., 45; *Southern Ry. Co. v. Reaves* (Ala.), 20 Am. & Eng. R. Cas., N. S., 784; *Keilbach v. Chicago, M. & St. P. Ry. Co.* (N. Dak.), 14 Am. & Eng. R. Cas., N. S., 28; *Louisville & N. R. Co. v. Bowen* (Ky.), 9 Am. & Eng. R. Cas., N. S., 276.

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plaintiff was employed with his team on defendant's roadbed, plaintiff was entitled to recover for any failure of defendant's servants to perform the general duty of keeping a lookout for stock trespassing or rightfully on the track, even though such servants had no knowledge that road work was in progress.

**Same—Negligence—Question for Jury.**

Defendant's freight train came in sight of plaintiff and his team on the track when the train was 500 or 600 feet away, and running, heavily loaded, down grade at a speed of 20 miles per hour. Defendant's engineer testified that he did all a skillful engineer could do to prevent the accident, but that it was not possible to stop the train: *held* that, as the circumstances of the accident might have afforded ground for an inference opposed to the testimony of the engineer, the question of negligence was properly submitted to the jury.

**Same—Failure to Maintain Lookout—Negligence.**

In an action against a railroad company for negligently running its train against plaintiff's mule, where there was no evidence that the engineer alone was charged with the duty of keeping a lookout, the jury were entitled to consider the fault in the conduct of the fireman, as well as the engineer.

**Trover—Abandonment.**

Plaintiff's mule was injured by defendant's train, and plaintiff told defendant's section foreman that he did not want the mule, and would not do anything for it; that it would always be crippled, and had better be killed. The foreman told plaintiff to lead the mule away, and he would kill it, or have it killed. Plaintiff did so, and did nothing further for the animal, and the foreman, claiming to be authorized by defendant to do so, sold the mule to a third person: *held*, to show, as a matter of law, that plaintiff abandoned the mule, so that he was not thereafter entitled to maintain trover against defendant therefor.

Appeal from city court of Birmingham; Chas. A. Senn, Judge.

Action by C. H. Wagand against the Kansas City, Memphis & Birmingham Railroad Company. From a judgment for plaintiff, defendant appeals. **Reversed.**

In the first count of the complaint, the plaintiff sued to recover in an action of case for the negligence of the defendant or its employees, and the negligence, as alleged therein, was as follows: "Plaintiff avers that at the time aforesaid the defendant was filling in a trestle at or near Coal Creek, in Jefferson county, Alabama, and on the line of said railroad, and while he was engaged in said work, the defendant, by its servants and employees, did carelessly and negligently run one of its trains upon and against a mule owned by plaintiff, and did thereby bruise, maim, and injure said mule, to plaintiff's damages, as aforesaid." The other counts of the complaint and the circumstances of the accident are sufficiently stated in the opinion. It was shown that the train which was attached to the engine that caused the accident was a freight train; that at the time the train was coming around a curve, which was 500 or 600 feet away from the place of the accident, and it was running at the rate of 20 miles an hour, <sup>1</sup> was heavily loaded; that from said curve to the place of accident was a down grade. The engineer who was in

Kansas City, M. & B. R. Co. v. Wagand

charge of the engine testified, as a witness for the defendant, that he saw the plaintiff and his team on the track as soon as he came around the curve; that he did all things in his power, and everything that could be done by skillful engineers, to prevent the accident; that it was not possible, at the speed the train was going, to stop it, after the mule was seen, before the train reached the place of the accident. The other facts of the case are sufficiently stated in the opinion. The defendant requested the court, among others, to give to the jury the following written charges, and separately excepted to the court's refusal to give each of the said charges as asked: (1) "If you believe from the evidence that the engineer in charge of the train was guilty of no negligence, your verdict cannot be for the plaintiff under the first count of the complaint." "(3) If you believe the evidence, you cannot find for the plaintiff under the first count of the complaint. (4) If you believe the evidence, you cannot find for the plaintiff under the second count of the complaint." There were verdict and judgment for the plaintiff, assessing his damages at \$125. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Walker, Tillman, Campbell & Porter, for appellant.

SHARPE, J. Being employed by defendant's contractor, plaintiff was using his team to draw a wheeled scraper on a high part of defendant's roadbed when a train came around a curve and into sight 500 or 600 feet away. Plaintiff turned the team off the track, but a wheel of the scraper was struck by the train, and as a result of the jerk, or in some other way, the train also struck one of the mules, breaking a bone of its hip. Afterwards plaintiff told defendant's section foreman he would not do anything with the mule, or anything for it, and did not want it; that if it lived it would still be crippled, and that it would be better "to kill it out of its misery." The foreman then told plaintiff to lead the mule over the hill, and he would kill it, or have it killed. Thereupon plaintiff carried the animal to the place so designated, left it there, and there is nothing to show he ever afterwards did anything for or with it. The next day after plaintiff so left the mule, the section foreman, claiming to have authority from his company to do so, sold the mule for \$5 to a third person, who subsequently cured and kept it. In his complaint the plaintiff counts, first, in case; second, in trover; and, third, for a willful injury to the mule; but as to the latter count the jury were charged affirmatively for the defendant.

1. Though defendant's servants who were running the train may not have known the road work was in progress, they were under the general duty to keep a lookout, in order to avoid injury to stock whether trespassing or rightfully on the track; and since plaintiff was using his team rightfully, he is in position to complain of any failure to keep such lookout,

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as well as of any neglect of the further duty which rested on defendant to use diligent efforts to avoid injury to the team after its perilous position was discovered. The space over which the train had to pass before reaching the team after it came within range of the trainmen's vision, together with the train's velocity at the place of accident, were circumstances in evidence which may have afforded an inference opposed to testimony of defendant's witnesses concerning both the look-out and the efforts made at checking speed, and therefore the question of negligence was properly left to the jury.

2. Without evidence that the engineer was alone charged with those duties, especially that of looking ahead, the jury had the right to consider of fault in the conduct of the fireman, as well as of the engineer.

3. The owner of personal property may divest himself of title by abandonment, and, after doing so, he cannot maintain trover against one who thereafter assumes the ownership. *Wyman v. Hurlburt*, 12 Ohio, 81, 40 Am. Dec. 461; 1 Am. & Eng. Enc. Law, 2. This can be only where the owner has intended to relinquish his property rights, and where the evidence on the point is conflicting, or leaves room for contrary inferences, the question of abandonment *vel non* is for the jury. Here, however, the evidence is without conflict, and the plaintiff's declarations and conduct, above referred to, lead solely to the conclusion that the plaintiff both entertained and carried out the intention of abandoning his property in the animal. In view of such proof, defendant was entitled to have the jury charged upon the assumption that the plaintiff had no interest in the animal when the suit was brought, and therefore no right to recover under the second count of the complaint. For the refusal of charge 4, requested by defendant, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

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WEEKS v. WILMINGTON & W. R. Co.

(*Supreme Court of North Carolina, Sept. 30, 1902.*)

[42 S. E. Rep. 541.]

**Contributory Negligence—Jumping from Trestle through Fright.**

Plaintiff, who was a lady, and two female companions were walking on the track of defendant railway company, and as they passed the station heard the agent say that the mail train was expected in 17 minutes. They continued walking on the track, and went out on a trestle a distance of 120 feet, beyond which was a bridge 117 feet long. Plaintiff testified that they knew when they went on the trestle that they had not time to get across the bridge and trestle before the train came. On reaching the edge of the bridge proper, they looked back, saw a train coming, and tried to return over the trestle. The train was not going to cross the bridge, but plaintiff, not knowing this, and fearing she would not be able to get off the trestle before the train reached her, jumped from the trestle, and was injured: *held*, that in going on the trestle plaintiff was guilty of

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negligence as a matter of law, making her responsible for her imprudent method of avoiding the threatened injury.

**Negligence—Doctrine of Discovered Peril.**

If the train stopped before plaintiff jumped, and did not go on the trestle until afterward, defendant was not guilty of negligence, under the doctrine of discovered peril.

**Appeal from superior court, Jones county; Winston, Judge.**

**Action by Mamie Weeks against the Wilmington & Weldon Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.**

**Junius Davis, for appellant.**

**Simmons & Ward and P. M. Pearsall, for appellee.**

**COOK, J.** On October 3, 1899, plaintiff and two other ladies, Misses Simmons and Emmett, were out walking, and as they passed by defendant's depot heard the agent say that the mail train, due from the north, was expected in 17 minutes. They then walked along the railroad track towards the Trent river, some 400 feet distant, which is spanned by a railroad bridge. Before reaching the river, the track is upon an embankment about 12 feet high, then follows a trestle 120 feet to the river, and 12 or 14 feet above the ground, then the bridge 117 feet across, and then the trestle on the north side 31 feet long. The bridge and trestle are not provided with any conveniences as a passway for people, nor is there any place of safety provided for people to protect themselves from a passing train. When they came to the trestle, they did not intend to go across, for, testifies the plaintiff, "we knew we could not get across before the train came," but continued their walk upon the trestle (120 feet, nearly half way across), until they reached the bridge, just over the water, when one of them suggested, "Suppose the train would come, what should we do?" Just then they looked back, and saw a train coming (this was a log train, coming up from Maysville to Pollokville to take siding and let the passenger train pass), and turned back, meeting it, which was then a "little way from the depot." Miss Emmett ran and got off the trestle, and ran down the embankment some 25 or 50 yards ahead of the engine, and the other two might have done likewise, but Miss Simmons would not run and leave Miss Weeks, the plaintiff, who was weak and feeble, caused by an accident which had happened to her two months previous, rendering her unable to run fast. But such weakness and feebleness were not known to defendant's employees on the train. The train was not going to cross the bridge, but this was not known to plaintiff and her companions. Miss Simmons had plaintiff by the hand, and they were trying to get off, but plaintiff, being weak, and thinking that she could not get off, pushed Miss Simmons aside, and seeing the engine coming near the trestle, Miss Simmons swung down by the capsill her length, and jumped, landing upon the ground unhurt, and plaintiff

jumped from the top of the trestle to the ground, 14 feet beneath, and was injured in the ankle and back. Plaintiff and Miss Emmett and one of defendant's witnesses testified that when she jumped, the engine was close upon and moving towards her, and did not stop until it had passed beyond the place from which she jumped; and while upon the ground, plaintiff and Miss Simmons looked up, and saw log cars above them, and the cinders from the engine fell down upon them. Eight witnesses (three of whom were employees upon the train, and five not connected with defendant) testified on behalf of defendant that the train stopped at the clear post, 12 or 16 feet from the trestle, and did not go upon the trestle until after the ladies had jumped off. There was also evidence that one of the employees of defendant company (Brandt) hallooed to the ladies not to jump, and that it was heard by the witness Lee, 125 yards away. Witness Harriott testified that plaintiff was about two bents (about 24 feet) from the south end of the trestle when she jumped.

Of the eight assignments of error, we deem it necessary to consider only the third. Defendant requested the court to charge the jury that "if the jury shall believe from the evidence that the engine of the defendant stopped upon the embankment on the south end of the trestle, and did not go upon the trestle until after the plaintiff had jumped from the trestle, then the jury should answer the first issue 'No.'" The first issue was, "Was plaintiff injured by the negligence of the defendant?" His honor refused to give this instruction, and in this there is error. This railroad bridge and trestle were constructed solely for the use of the defendant company, and no invitation was extended to the public to go upon them, so no place of safety was provided against the passing of trains. Plaintiff knew of its danger, for that was apparent. She also knew that a train was expected to cross it within 17 minutes after she left the depot, 400 feet away, and knew that she could not get across before the train came, and in the face of such knowledge went nearly half way (120 feet) across it, without stopping to consider the danger. Being uninvited, and without even showing a license to enter upon it, she voluntarily put herself in a dangerous and perilous condition, and became a trespasser.

There is no conflict in the evidence concerning the trestle and bridge, and of the plaintiff's being on it, and of her conduct while there, and that the trestle was from 12 to 14 feet high, and a place of danger; so negligence becomes a question of law, and this court has decided that such entry upon a trestle under similar circumstances is contributory negligence. Therefore, upon the uncontradicted evidence of plaintiff and defendant, plaintiff was guilty of negligence in going upon the trestle. In *Little v. Railroad Co.*, 119 N. C., on page 776, 26 S. E. 110, the court says: "It was decided in *Clark v. Railroad Co.*, 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749,



that a person who places himself on a railroad trestle so high as to make it perilous for him to jump to the ground is negligent, and that he is guilty of contributory negligence if he is injured by a passing train." In this case plaintiff was not injured by a passing train, but was injured by her own act, which is alleged and insisted upon as having been forced upon her by the negligence of defendant in not stopping its train, and by failing to do so, forced her, as a dernier ressort, to accept the lesser of two apparent dangers. If the train was stopped at or near the clear post, as testified to by defendant's witnesses, then defendant discharged its duty, and would not be liable; but if it was not stopped, but continued its course, as testified to by plaintiff and her witnesses, it would be. When did it become the duty of defendant to stop the train? When the engineer first saw the ladies on the trestle? Certainly not, for he saw one run forward, and get off, 25 or 50 yards ahead of the engine. The other two remained upon the trestle, and were in no danger of the engine, if it was to be stopped at the clear post, as testified to by the employees on the train. They had the same opportunity, and apparently a like physical power, to come forward and get off that Miss Emmett had, had they so desired. Why they remained was not known to the engineer. He did not know of the feeble condition of plaintiff, but had a right to presume that she was able to take care of herself, and that she and her companion would do so. If, being conscious of her feeble condition, she became frightened, and in her excitement imprudently and unnecessarily jumped over and was injured, that was her misfortune, and not defendant's fault. She was not placed or induced to go upon the trestle by any negligence of defendant company, but, being there, she could have remained or gone in the direction of the bridge with perfect safety, if unable to head off the train, as Miss Emmett did. Therefore, if she adopted a perilous mode in endeavoring to escape an apprehended danger under excitement, defendant could not be responsible for the result. Beach, Contrib. Neg. (3d Ed.) § 40; Jones v. Boyce, 1 Starkie, 493. Had plaintiff gone upon the trestle through the negligence of defendant, and acted negligently or wildly under the excitement in adopting a means of escape, and been injured, then it would not be considered negligence or contributory negligence, although there may have been at her command a safer and more certain means of escape, "for the reason that persons in great peril are not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances." Beach, supra. But "no such allowance is made in favor of one whose own fault has brought him into the peril which disturbs his judgment." 1 Shear. & R. Neg. § 89. So, plaintiff having voluntarily gone upon this dangerous place, which is deemed negligence by our court (Little v. Railroad, supra), she would be required to

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guaranty her own judgment when confronted with peril, and the emergency arose. But plaintiff alleges, and so testifies, together with two other witnesses, that the train did not stop, and had she remained on the trestle she would have been killed; wherefore she acted prudently, and escaped with an injured ankle and back rather than lose her life. Whether this was so or not was most material to the issue. If it be true, as she testifies, then defendant company, having had the last clear chance, and having failed to exercise it, would be guilty of negligence, and plaintiff would be entitled to recover, notwithstanding her negligence. But if it be not true, and be as testified to by eight witnesses on behalf of defendant, and the engine was stopped some 35 or 40 feet from her, then she was not in peril from the approaching train, and no allowance would be made by the unwise, negligent, and imprudent method of escape adopted by her under excitement and apprehension, and defendant company would not be guilty of negligence, and his honor should have instructed the jury as prayed for in the third prayer.

New trial.

DOUGLAS, J., concurs only in result.

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**SEGO v. SOUTHERN PAC. CO.**

*(Supreme Court of California, Oct. 2, 1902.)*

[70 Pac. Rep. 279.]

**Railroads—Accident at Crossing—Company's Willful Negligence—Contributory Negligence—Effect.\***

Though a railroad company was willfully and wantonly negligent in running a train at excessive speed over a crossing greatly used by the public where there was no flagman, yet where a traveler negligently attempted to cross the track in front of such train, and was killed, the company was not liable in damages.

Department I. Appeal from superior court, Solano county; A. J. Buckles, Judge.

Action by F. F. Sego against the Southern Pacific Company. From judgment for defendant, plaintiff appeals. Affirmed.

Arthur W. North, Frank R. Devlin, and George R. Lovejoy, for appellant.

George A. Lamont and Foshay Walker, for respondent.

GAROUTTE, J. Action for damages brought by the father for the death of his son, defendant's train having killed him at a highway crossing. Defendant relied upon contributory negligence, and at the conclusion of plaintiff's evidence he was nonsuited upon that ground. The appeal is taken from the judgment and a bill of exceptions containing the evidence.

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\*See foot-note appended to *Chicago, I. & L. Ry. Co. v. Reed* (Ind.), 3 R. R. R. 627, 26 Am. & Eng. R. Cas., N. S., 627.



## Sego v. Southern Pac. Co

For the purposes of this appeal it will be assumed that deceased was guilty of contributory negligence in attempting to cross the railroad track in front of the moving train. It will also be assumed for the purposes of the appeal that defendant was guilty of negligence by reason of the manner in which it was running its train at the place of the accident, in this: that the speed was excessive, and that the crossing was one greatly used by the traveling public,—no flagman being in attendance. In the face of the two concessions suggested, involving the negligence of the defendant and the contributory negligence of the party killed, plaintiff claims that defendant was guilty of wanton and willful negligence in running its train at an excessive rate of speed at the place where the accident occurred, and therefore deceased's contributory negligence does not defeat a recovery. Whatever the law upon this question may be in some of the other states of the Union, we are not specially concerned, for in this state it may be said to be well settled. This question was directly involved in *O'Brien v. McGlinchy*, 68 Me. 552, where the court said: "Generally, it is a defense to an action of tort that the plaintiff's negligence contributed to produce the injury. But in cases falling within the foregoing description, where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant. This rule applies usually in cases where the plaintiff or his property is in some position of danger from a threatened contact with some agency under the control of the defendant, when the plaintiff cannot, and the defendant can, prevent an injury. Lord Ellenborough, in *Butterfield v. Forrester*, 11 East, 60,—a much-quoted case,—declared that 'one's being in fault will not dispense with another's using ordinary care.' Blackburn, J., in *Radley v. Railway Co.*, L. R. 10 Exch. 100, expresses the idea in this wise: 'A man is bound, when he puts himself in a place where he knows other persons are coming, not only for his own safety, but for that of his neighbors, to take reasonable care of himself and of his property; but, whether he does this or not, it does not relieve anybody else who comes there from the duty of also taking reasonable care.' \* \* \* But this principle would not govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them; not where the negligent act of the defendant takes place first, and the negligence of the plaintiff operates as an intervening cause between it and the injury." The law is well stated in this Maine case, and it has been approved by several decisions of this court. It appeals to sound reason

not be held to come within the fair import of the terms of this law either because their owner intends to use them for that purpose at some future time, or because they have been or will be so used. Empty cars in repair shops, in yards, on side tracks, those in use to transport traffic within a state and for that purpose alone, are not in use to move articles of interstate commerce, and do not fall under the ban of this law. Neither the empty dining car standing upon the side track, nor the freight engine which was used to turn it at the little station in Utah, was then used in moving interstate traffic, within the meaning of this statute, and this case did not fall within the provisions of this law.

The judgment below must accordingly be affirmed, and it is so ordered.

THAYER, Circuit Judge. I am unable to concur in the conclusion, announced by the majority of the court, that the act of congress of March 2, 1893 (27 Stat. 531, c. 196), does not require locomotive engines to be equipped with automatic couplers; and I am equally unable to concur in the other conclusion announced by my associates that the dining car in question at the time of the accident was not engaged or being used in moving interstate traffic.

In my judgment, it is a very technical interpretation of the provisions of the act in question, and one which is neither in accord with its spirit nor with the obvious purpose of the law-maker, to say that congress did not intend to require engines to be equipped with automatic couplers. The statute is remedial in its nature; it was passed for the protection of human life; and there was certainly as much, if not greater, need that engines should be equipped to couple automatically, as that ordinary cars should be so equipped, since engines have occasion to make couplings more frequently. In my opinion, the true view is that engines are included by the words "any car," as used in the second section of the act. The word "car" is generic, and may well be held to comprehend a locomotive or any other similar vehicle which moves on wheels; and especially should it be so held in a case like the one now in hand, where no satisfactory reason has been assigned or can be given which would probably have influenced congress to permit locomotives to be used without automatic coupling appliances.

I am also of opinion that, within the fair intent and import of the act, the dining car in question at the time of the accident was being hauled or used in interstate traffic. The reasoning by which a contrary conclusion is reached seems to me to be altogether too refined and unsatisfactory to be of any practical value. It was a car which at the time was employed in no other service than to furnish meals to passengers between Ogden and San Francisco. It had not been taken out of that service, even for repairs or for any other use, when the accident occurred, but was engaged therein to the same extent

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that it would have been if it had been hauled through to Ogden, and if the accident had there occurred while it was being turned to make the return trip to San Francisco. The cars composing a train which is regularly employed in interstate traffic ought to be regarded as used in that traffic while the train is being made up with a view to an immediate departure on an interstate journey as well as after the journey has actually begun. I accordingly dissent from the conclusion of the majority of the court on this point.

While I dissent on the foregoing propositions, I concur in the other view which is expressed in the opinion of the majority, to the effect that the case discloses no substantial violation of the provisions of the act of congress, because both the engine and the dining car were equipped with automatic coupling appliances. In this respect the case discloses a compliance with the law, and the ordinary rule governing the liability of the defendant company should be applied. The difficulty was that the car and engine were equipped with couplers of a different pattern, which would not couple, for that reason, without a link. Janney couplers and Miller couplers are in common use on the leading railroads of the country, and congress did not see fit to command the use of either style of automatic coupler to the exclusion of the other, while it must have foreseen that, owing to the manner in which cars were ordinarily handled and exchanged, it would sometimes happen, as in the case at bar, that cars having different styles of automatic couplers would necessarily be brought in contact in the same train. It made no express provision for such an emergency, but declared generally that, after a certain date, cars should be provided with couplers coupling automatically. The engine and dining car were so equipped in the present instance, and there was no such violation of the provisions of the statute as should render the defendant company liable to the plaintiff by virtue of the provisions contained in the eighth section of the act. In other words, the plaintiff assumed the risk of making the coupling in the course of which he sustained the injury. On this ground I concur in the order affirming the judgment below.

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(*Supreme Court of Alabama, June 28, 1902.*)

[32 So. Rep. 744.]

## Injury to Team Working on Track—Failure to Maintain Lookout.\*

Where plaintiff's mule was injured by defendant's train while

\*See foot-note appended to *Kansas City, M. & B. R. Co. v. Henson* (Ala.), 1 R. R. R. 674, 24 Am. & Eng. R. Cas., N. S., 674; *Louisville & N. R. Co. v. Kice* (Ky.), 20 Am. & Eng. R. Cas., N. S., 45; *Southern Ry. Co. v. Reaves* (Ala.), 20 Am. & Eng. R. Cas., N. S., 784; *Keilbach v. Chicago, M. & St. P. Ry. Co.* (N. Dak.), 14 Am. & Eng. R. Cas., N. S., 28; *Louisville & N. R. Co. v. Bowen* (Ky.), 9 Am. & Eng. R. Cas., N. S., 276.

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plaintiff was employed with his team on defendant's roadbed, plaintiff was entitled to recover for any failure of defendant's servants to perform the general duty of keeping a lookout for stock trespassing or rightfully on the track, even though such servants had no knowledge that road work was in progress.

**Same—Negligence—Question for Jury.**

Defendant's freight train came in sight of plaintiff and his team on the track when the train was 500 or 600 feet away, and running, heavily loaded, down grade at a speed of 20 miles per hour. Defendant's engineer testified that he did all a skillful engineer could do to prevent the accident, but that it was not possible to stop the train: *held* that, as the circumstances of the accident might have afforded ground for an inference opposed to the testimony of the engineer, the question of negligence was properly submitted to the jury.

**Same—Failure to Maintain Lookout—Negligence.**

In an action against a railroad company for negligently running its train against plaintiff's mule, where there was no evidence that the engineer alone was charged with the duty of keeping a lookout, the jury were entitled to consider the fault in the conduct of the fireman, as well as the engineer.

**Trover—Abandonment.**

Plaintiff's mule was injured by defendant's train, and plaintiff told defendant's section foreman that he did not want the mule, and would not do anything for it; that it would always be crippled, and had better be killed. The foreman told plaintiff to lead the mule away, and he would kill it, or have it killed. Plaintiff did so, and did nothing further for the animal, and the foreman, claiming to be authorized by defendant to do so, sold the mule to a third person: *held*, to show, as a matter of law, that plaintiff abandoned the mule, so that he was not thereafter entitled to maintain trover against defendant therefor.

Appeal from city court of Birmingham; Chas. A. Senn, Judge.

Action by C. H. Wagand against the Kansas City, Memphis & Birmingham Railroad Company. From a judgment for plaintiff, defendant appeals. **Reversed.**

In the first count of the complaint, the plaintiff sued to recover in an action of case for the negligence of the defendant or its employees, and the negligence, as alleged therein, was as follows: "Plaintiff avers that at the time aforesaid the defendant was filling in a trestle at or near Coal Creek, in Jefferson county, Alabama, and on the line of said railroad, and while he was engaged in said work, the defendant, by its servants and employees, did carelessly and negligently run one of its trains upon and against a mule owned by plaintiff, and did thereby bruise, maim, and injure said mule, to plaintiff's damages, as aforesaid." The other counts of the complaint and the circumstances of the accident are sufficiently stated in the opinion. It was shown that the train which was attached to the engine that caused the accident was a freight train; that at the time the train was coming around a curve, which was 500 or 600 feet away from the place of the accident, and it was running at the rate of 20 miles an hour, and was heavily loaded; that from said curve to the place of the accident was a down grade. The engineer who was in

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charge of the engine testified, as a witness for the defendant, that he saw the plaintiff and his team on the track as soon as he came around the curve; that he did all things in his power, and everything that could be done by skillful engineers, to prevent the accident; that it was not possible, at the speed the train was going, to stop it, after the mule was seen, before the train reached the place of the accident. The other facts of the case are sufficiently stated in the opinion. The defendant requested the court, among others, to give to the jury the following written charges, and separately excepted to the court's refusal to give each of the said charges as asked: (1) "If you believe from the evidence that the engineer in charge of the train was guilty of no negligence, your verdict cannot be for the plaintiff under the first count of the complaint." "(3) If you believe the evidence, you cannot find for the plaintiff under the first count of the complaint. (4) If you believe the evidence, you cannot find for the plaintiff under the second count of the complaint." There were verdict and judgment for the plaintiff, assessing his damages at \$125. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Walker, Tillman, Campbell & Porter, for appellant.

SHARPE, J. Being employed by defendant's contractor, plaintiff was using his team to draw a wheeled scraper on a high part of defendant's roadbed when a train came around a curve and into sight 500 or 600 feet away. Plaintiff turned the team off the track, but a wheel of the scraper was struck by the train, and as a result of the jerk, or in some other way, the train also struck one of the mules, breaking a bone of its hip. Afterwards plaintiff told defendant's section foreman he would not do anything with the mule, or anything for it, and did not want it; that if it lived it would still be crippled, and that it would be better "to kill it out of its misery." The foreman then told plaintiff to lead the mule over the hill, and he would kill it, or have it killed. Thereupon plaintiff carried the animal to the place so designated, left it there, and there is nothing to show he ever afterwards did anything for or with it. The next day after plaintiff so left the mule, the section foreman, claiming to have authority from his company to do so, sold the mule for \$5 to a third person, who subsequently cured and kept it. In his complaint the plaintiff counts, first, in case; second, in trover; and, third, for a willful injury to the mule; but as to the latter count the jury were charged affirmatively for the defendant.

1. Though defendant's servants who were running the train may not have known the road work was in progress, they were under the general duty to keep a lookout, in order to avoid injury to stock whether trespassing or rightfully on the track; and since plaintiff was using his team rightfully, he is in position to complain of any failure to keep such lookout,

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it was the common practice for the children of the family and other children in the neighborhood to resort to the coalhouse, roundhouse, and turntable, and to amuse themselves by revolving the turntable, and riding on it while it was in motion, and that this practice was known to the defendant, who permitted it without protest.

On the 20th day of October, 1895, in the absence of his parents, the plaintiff,—he was then four years of age,—in company with some other members of the family, the oldest of whom was eleven years old, and some other children, the oldest of whom was fourteen, were playing with a push car, moving it up and down on the railroad track. The agent in charge of the station joined them, and rode a short distance on the car. He then left them, and went to his rooms in the station. The children continued to push the car, and finally reached the turntable. There is evidence sufficient to sustain a finding that they found the turntable unlocked and unguarded, but the evidence is conflicting on that point. The plaintiff and some of the other children got on the turntable, while two of the others set it in motion. While it was in motion the plaintiff's foot was caught between the rails, and severed at the ankle joint. The injury thus sustained is that for which damages is sought in this action. A trial was had to a jury, which resulted in a verdict and judgment for the plaintiff. The defendant brings error.

The first question raised is that the petition does not state facts sufficient to constitute a cause of action. The grounds of this objection, as stated in the defendant's brief, are as follows: "It does not allege the authority of any agent of the defendant to invite the plaintiff upon its turntable, or any facts which constitute such express invitation. It does not allege the characteristics either of location or construction of the table, which of themselves render the table an invitation to the danger." The petition is too long to set out at length. We think it will suffice to say that the allegations in these respects are that the plaintiff was induced by other small children, with the knowledge and consent of the defendant, its agents and servants, and by the invitation of the defendant, to come to and about the turntable. On the face of the petition, this is an allegation of an invitation by the defendant. If the plaintiff were invited by the defendant, he was invited by some agent of the defendant having authority in the premises. The allegation in that regard is sufficient. It is true the facts constituting such invitation are not set forth, nor do we deem it necessary that they should be for the purposes of the objection under consideration, which was first made by an objection to the introduction of any testimony, on the ground that the facts stated in the petition did not constitute a cause of action.

The question to which counsel have directed the greater portion of their arguments is whether the facts in this case



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are sufficient to sustain the verdict. On this question we have been favored with an exhaustive discussion of what is commonly known as the "doctrine of the Turntable Cases," which applied to the facts in this case, would sustain the verdict. The leading case in support of this doctrine is Railroad Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745. The doctrine was reaffirmed by the same court in Railroad Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, and was expressly approved by this court in Railroad Co. v. Bailey, 11 Neb. 336, 9 N. W. 50, and was approved and applied in the following among other cases: Barrett v. Pacific Co., 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186; Keffe v. Railway Co., 21 Minn. 207, 18 Am. Rep. 393; Twist v. Railroad Co. (Minn.) 39 N. W. 402, 12 Am. St. Rep. 626; Railway Co. v. Fitzsimmons, 22 Kan. 686, 31 Am. Rep. 203; Navigation Co. v. Hedrick, 1 Wash. 446, 25 Pac. 335, 22 Am. St. Rep. 169; Railroad Co. v. Skidmore (Tex. Civ. App.) 65 S. W. 215; Railway Co. v. McWhirter, 77 Tex. 356, 14 S. W. 26, 19 Am. St. Rep. 755; Harriman v. Railway Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; Ferguson v. Railway Co., 75 Ga. 637; Nagel v. Railway Co., 75 Mo. 653, 42 Am. Rep. 418.

The doctrine, as we gather it from the cases cited, is that where a turntable is so situated that its owner may reasonably expect that children too young to appreciate the danger will resort to it, and amuse themselves by using it, it is guilty of negligence for a failure to take reasonable precautions to prevent such use. It has not been permitted to pass as law unchallenged. On the contrary, it has been expressly repudiated in many cases, among which are the following: Walsh v. Railroad Co. (N. Y.) 39 N. E. 1069, 27 L. R. A. 724, 45 Am. St. Rep. 615; Daniels v. Railroad Co., 154 Mass. 349, 28 N. E. 283, 13 L. R. A. 248, 26 Am. St. Rep. 253; Frost v. Railroad, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396; Railroad Co. v. Reich (N. J. Err. & App.) 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727. It has been criticised in others, among which are Ryan v. Towar (Mich.) 87 N. W. 644, 55 L. R. A. 310, and Dobbins v. Railroad Co. (Tex. Sup.) 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856. The latter case would seem to throw some doubt on the position of the courts of Texas in regard to the doctrine in question; but the case of Railroad Co. v. Skidmore, *supra*, appears to be the latest expression of the court on the question.

The defendant insists that the doctrine is unsound, and asks that it be repudiated by the court, and that the case of Railroad Co. v. Bailey, *supra*, be overruled. The argument in this behalf rests on the proposition that the owner of dangerous premises owes no active duty to trespassing children. The assumption that the plaintiff was a trespasser might well be questioned. The right of way was his home and playground; it was where his father performed his daily labors; it was used as a path and for other purposes by the family. But, as the

duty of the owner of dangerous premises to infant trespassers is raised by other assignments, it will shorten this opinion to allow the assumption to pass unchallenged. The proposition is not universally true, as is clearly shown, we think, by Sedgwick, J., in *Tucker v. Draper*, 62 Neb. 66, 86 N. W. 917, wherein he says: “\* \* \* There may be, and often are, circumstances under which one owes some active duty to a trespasser upon his premises. If a man willfully lies down upon a railroad track, the engineer must not wantonly run his engine over him. One may not set a snare or spring gun for trespassers, and, knowing that some stranger had placed the snare or spring gun, if he wantonly allows it to remain he will be responsible for the consequences. A well may be so contrived as to act as a dangerous trap, and one who allows it so to remain upon his premises will, under some circumstances, be liable. If adults, or children of such age as to ordinarily be capable of discerning and avoiding danger, are injured while trespassing upon the premises of another, they may be without remedy, while under similar circumstances children of three or four years of age would be protected. If I know that there is an open well upon my premises, and know that children of such tender years as to have no notion of their danger are continually playing around it, and I can obviate the danger with very little trouble to myself, and without injuring the premises or interfering with my own free use thereof, I owe an active duty to those children, and if I neglect that duty, and they fall into the well and are killed, it is through my negligence. I cannot urge their negligence as a defense, even though I have never invited or encouraged them, expressly or impliedly, to go upon the premises.”

The language amounts to a reaffirmance of the doctrine of the turntable cases, and, to our minds, suggests the true principle upon which cases of this character rest; that is, that where the owner of dangerous premises knows, or has good reason to believe, that children so young as to be ignorant of the danger will resort to such premises he is bound to take such precautions to keep them from such premises, or to protect them from injuries likely to result from the dangerous condition of the premises while there, as a man of ordinary care and prudence, under like circumstances, would take. At first sight, it would seem that the principle, thus stated, is too broad, and that its application would impose unreasonable burdens on owners, and intolerable restrictions on the use and enjoyment of property. But it must be kept in mind that it requires nothing of the owner that a man of ordinary care and prudence would not do of his own volition, under like circumstances. Such a man would not willingly take up unreasonable burdens, nor vex himself with intolerable restrictions.

It is true, as said in *Loomis v. Terry*, 17 Wend. 497, 31 Am. Dec. 306, “the business of life must go forward”; the means



by which it is carried forward cannot be rendered absolutely safe. Ordinarily, it can be best carried forward by the unrestricted use of private property by the owner; therefore the law favors such use to the fullest extent consistent with the main purpose for which, from a social standpoint, such business is carried forward, namely, the public good. Hence, in order to determine the extent to which such use may be enjoined, its bearing on such main purpose must be taken into account, and a balance struck between its advantages and disadvantages. If, on the whole, such use defeats, rather than promotes, the main purpose, it should not be permitted; on the other hand, if the restrictions proposed would so operate, they should not be imposed. The business of life is better carried forward by the use of dangerous machinery; hence the public good demands its use, although occasionally such use results in the loss of life or limb. It does so because the danger is insignificant, when weighed against the benefits resulting from the use of such machinery, and for the same reason demands its reasonable, most effective, and unrestricted use, up to the point where the benefits resulting from such use no longer outweigh the danger to be anticipated from it. At that point the public good demands restrictions. For example, a turntable is a dangerous contrivance, which facilitates railroading; the general benefits resulting from its use outweigh the occasional injuries inflicted by it; hence the public good demands its use. We may conceive of means by which it might be rendered absolutely safe, but such means would so interfere with its beneficial use that the danger to be anticipated would not justify their adoption; therefore the public good demands its use without them. But the danger incident to its use may be lessened by the use of a lock which would prevent children, attracted to it, from moving it; the interference with the proper use of the turntable occasioned by the use of such lock is so slight that it is outweighed by the danger to be anticipated from an omission to use it; therefore the public good, we think, demands the use of the lock. The public good would not require the owner of a vacant lot on which there is a pond to fill up the pond or inclose the lot with an impassable wall to insure the safety of children resorting to it, because the burden of doing so is out of proportion to the danger to be anticipated from leaving it undone. *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915. But where there is an open well on a vacant lot, which is frequented by children, of which the owner of the lot has knowledge, he is liable for injuries sustained by children falling into the well, because the danger to be anticipated from the open well, under the circumstances, outweighs the slight expense or inconvenience that would be entailed in making it safe. *Tucker v. Draper*, *supra*.

Hence, in all cases of this kind in the determination of the question of negligence, regard must be had to the character

and location of the premises, the purpose for which they are used, the probability of injury therefrom, the precautions necessary to prevent such injury, and the relations such precautions bear to the beneficial use of the premises. The nature of the precautions would depend on the particular fact in each case. In some cases a warning to the children or the parents might be sufficient; in others, more active measures might be required. But in every case they should be such as a man of ordinary care and prudence would observe under like circumstances. If, under all the circumstances, the owner omits such precautions as a man of ordinary care and prudence, under like circumstances, would observe, he is guilty of negligence. We are fully satisfied that the principle under consideration is sound, and that its application would not operate oppressively on the owner. We see no good reason for receding from the position already taken by this court in cases of this character.

The defendant tendered the following instruction: "The jury are instructed that in this case the plaintiff claims, in substance, that the railroad company was negligent in the manner in which it kept and used the turntable by which the plaintiff was injured, and that the turntable in question was a machine that was naturally enticing to children, and that children were tempted to play on and about this turntable. On this point the court instructs you that the law is that the railroad company has the right to the exclusive use of its own grounds and turntable and other machinery, the same as any other person has the exclusive right and use of his own property and premises, and that the company was under no obligations to keep its turntable in such a condition that it would be safe and convenient for children to play upon and to use as a plaything; and the court instructs you that the defendant was under no obligation to keep a watchman at and about said turntable for the purpose of excluding children therefrom; that the company was only required to exercise reasonable care in the placing and using of said turntable, and have the same fitted with such appliances as would make it reasonably safe and convenient for the purpose for which it was intended." The court refused the instruction as tendered, and modified it by omitting the concluding clause, and inserting the following: "But the company was required to exercise reasonable care in the placing and fastening of the turntable and having the same fitted with such appliances as would make it reasonably safe in the situation where it was placed, under the circumstances as disclosed in this case."

The instruction as thus modified was given. The complaint of the refusal of the court to give the instruction as tendered is covered by what has been said on the sufficiency of the facts to sustain the verdict. But the defendant insists that the instruction as modified is erroneous, in that it submitted to the jury the proper construction and location of the turntable. Taking the instruction as a whole, we do not think

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it admits of that construction. The opening sentence informs the jury of the nature of the plaintiff's claim; that such claim is that the defendant "was negligent in the manner in which it kept and used the turntable by which the plaintiff was injured." In paragraph 7 of the instructions the jury were told that the action rests on the alleged negligence of the defendant in not keeping the turntable guarded, locked, or properly fastened. In the fifteenth paragraph they were told that the defendant "had a right to have and use the turntable in the carrying on of its business as a railroad company." The rejected clause of the instruction under consideration, as tendered by the defendant, uses the word "placing," the only word used in the substituted clause that could be construed as a reference to the location or construction of the turntable. From these considerations, we think the clause complained of has no reference to the location nor original construction of the turntable, but refers rather to the condition in which it was to be kept or left when not in use. In the light of the entire charge, the jury could hardly have understood it to refer to the location or construction of the turntable.

Another instruction tendered by the defendant is as follows: "If the jury find from the evidence that the turntable in question was a ponderous and powerful machine when set in motion, and that according to its mechanism it would turn easily, and when turned, even for a small space, it would accumulate a force of momentum of great power; and if you further find that the young people and children meddling with said turntable at the time of the injury complained of worked upon the levers of said machine back and forth through the small space in which the turntable could be moved, even when the fastenings were in proper place and held the machine; and that by the motion and momentum of the machine set in motion by the young people at the levers the fastenings became loosened so as to permit the turntable to go around, then you are instructed that under this state of facts the plaintiff could not recover, and your verdict should be for the defendant." It was refused, and its refusal is now assigned as error. The instruction entirely omits the question of due care. There was evidence to the effect that the lock used for the turntable was little, if any, obstacle to the use of the turntable by children, because one of the staples was loose, and could be easily removed. The instruction, if given, would have justified a finding of due care, however carelessly the turntable was fastened. That would have been erroneous. The instruction, in our opinion, was properly refused.

The court on its own motion gave the following instruction as part of the charge to the jury: "But if you find, from a preponderance of the evidence, that the turntable in question was a dangerous machine, and the defendants did know, or

had reason to believe, under the circumstances of the case, the children of the place would resort to the turntable to play, and that if they did they would or might be injured, then, if they took no means to keep the children away, and no means to prevent accident, this would be evidence of negligence, and would be answerable for damages caused thereby to the children of tender years, and who did not possess sufficient knowledge or understanding to know the danger or dangerous character of such turntable. However, the defendants are not insurers of the limbs of those, whether adults or children, who may resort to their grounds, and there are many injuries continually happening which involve no pecuniary liability to any one." The defendant contends that there is no evidence to support the hypothesis that the defendant took no means to keep the children away, and no means to prevent the accident. The evidence of at least one of the children who was present at the time, and who assisted in revolving the turntable at the time, is to the effect that it was not locked, but yielded at once to their efforts to move it. There is other evidence to the same effect. Another witness testifies that it was never locked. As to the means taken to keep the children from the turntable, a considerable portion of the testimony offered on behalf of the plaintiff tends to show that no such means were taken. The defendant contends that the location of the turntable, at a distance from the town, was, in itself, a means of protection. But the instruction has reference to circumstances as they existed at the time of the accident. The location of the turntable, as a means of protection, is important only as tending to show the improbability of children resorting to it, and that the defendant could not reasonably be expected to anticipate that they would do so. It becomes immaterial when, according to the hypothesis, the defendant knew, or had good reason to believe, that children would resort to the turntable and be injured by it. The instruction, we think, finds ample basis in the evidence.

Another criticism urged against this instruction is that it involves the province of the jury, in that it charged that if the defendant, under the circumstances stated, took no means to keep the children away, and no means to prevent the accident, it would be answerable in damages. The defendant insists that the question of negligence was one for the jury, and that it was not within the province of the court to say, in effect, that a certain state of facts constituted negligence. We are inclined to think this criticism is just. From the wording of the instruction, the jury could hardly draw any other conclusion than that, if they found the facts specifically stated therein, the verdict should be for the plaintiff; in other words, that such facts were to be considered by them, not only as evidence of negligence, but as negligence per se. It has been repeatedly held by this court that it is erroneous to single out and state a group of facts, and inform the jury that

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if such facts are found it establishes the existence of negligence. The question of negligence is seldom one of law, and the facts enumerated in the instruction should have been considered by the jury as evidence of negligence, to be considered in the light of all the other facts and circumstances shown in evidence. To thus single out and state a group of facts has been held by this court to amount to an improper comment on questions of fact by the court. We think the instruction was erroneous, and that the following cases support that view: *Railway Co. v. Baier*, 37 Neb. 235, 55 N. W. 913; *Railway Co. v. Morgan*, 40 Neb. 604, 59 N. W. 81; *Railroad Co. v. Oleson*, 40 Neb. 889, 59 N. W. 354; *Village of Culbertson v. Holliday*, 50 Neb. 229, 69 N. W. 853.

The nineteenth and twentieth paragraphs of the charge to the jury related to the measure of damages, and are as follows:

“(9) The jury are instructed if from the evidence in the case, and under the constructions of the court, the jury shall find the issues for the plaintiff, and that the plaintiff has sustained damages, as charged in the declaration, then, to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damage, but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their own knowledge, observation, and experience in the business affairs of life.

“(20) The jury are instructed that if, on the evidence in the case and under the instructions of the court, they find the issue in favor of the plaintiff, and that the plaintiff has sustained damages, as charged in the petition, then in assessing such damages they should take into consideration the age, expectancy of life of the plaintiff, his inability to labor as shown by the evidence, his mental anguish and bodily pain, if any has been shown, and whether or not the injury to the plaintiff is permanent. You should take all these elements into consideration, and allow him such a sum as will be fair and just compensation for the injuries sustained, not exceeding the sum of \$25,000. But you cannot allow him exemplary damages; that is, damages by way of punishment of the defendants.”

One objection urged against these instructions is that the jury were required to consider the facts and circumstances in evidence “in connection with their own knowledge, observation, and experience in the business affairs of life.” It is not only proper, but necessary, that, in arriving at a verdict, the jury should make use of such knowledge as they possess in common with other men. But the instruction imposes no such limitation. We think the jury might have fairly inferred from it that they were required to bring to bear any special knowledge which they might have on the subject, or the result



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of their observations and experience in like cases, which would be manifestly improper.

Another objection to the instructions in this behalf is that the jury were required to take into account the plaintiff's inability to labor as an element of damage. The defendant insists that as the plaintiff is a minor, in the custody of his father, who is charged with his support and entitled to his earnings during minority, his inability to labor during his minority is not a proper element of damage in this case. The case of *Railroad Co. v. Johnson* (Tex. Sup.) 44 S. W. 1067, was an action for personal injuries to an infant, and an instruction not different in principle from those complained of was held reversible error for the reasons now urged by the defendant. The same principle was involved in an instruction considered in *Decker v. McSorley* (Wis.) 86 N. W. 554. The instruction was condemned.

A further objection is urged against these instructions, and that is that they instruct the jury that the damages shall not exceed \$25,000. The defendant insists that an intimation was thereby conveyed to the jury that they might allow that sum, and that such intimation was prejudicial to the defendant. No authority is cited in support of this objection, nor are we aware that any exists. It is not unusual for courts to instruct the jury as to the limit of damages allowable under the pleadings in the case. As a matter of practice, we believe it should be omitted. If the damages awarded exceed the amount allowable, the remedy is simple. We believe that most lawyers will agree with us that the intimation conveyed to the jury by such a statement is dangerous to the defendant. We do not go to the extent of saying that it would constitute reversible error, but we believe the practice should be discountenanced.

In the course of the trial the court permitted the plaintiff to introduce in evidence a certain printed rule of the defendant which provided that turntables should be kept locked when not in use, and that it was the duty of agents at the stations where there was no engine house foreman to see that such turntables were locked after being used. Parol testimony was admitted to the same effect. It also admitted evidence to the effect that immediately after the accident the station agent went to the turntable and locked it. The defendant insists that the admission of this evidence was error. We do not think so. It was necessary to bring home to the defendant knowledge that children were likely to resort to the turntable. There is evidence tending to show that both employees mentioned in the rule introduced in evidence had knowledge of such fact, and the rule, taken in connection with the evidence to their relations to the defendant, tends to bring such knowledge home to the defendant. That the agent locked the turntable immediately after the accident had a bearing on the

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question of whether the turntable was locked before the accident, which was one of the issues in the case.

Another witness was permitted to testify that he went to the turntable after the accident, on the same day, and found the table unlocked. The defendant argues that it was not admissible to show the condition of the table after the accident occurred. This evidence, we think, is also admissible, as tending to show that the children found the turntable unlocked before the accident occurred.

Objection is also made to the admission of evidence of testimony to the effect that the roadmaster, or division superintendent, which one is not stated, was at the turntable after the accident, how long after does not appear. The objection of this evidence is not clear, nor are we able to see how it had any influence on the verdict one way or another. The objection that it was immaterial appears to be well founded, but we cannot see that its admission would constitute reversible error.

The defendant complains of the admission of testimony to the effect that the station agent on the day of the accident met the children, who were playing with the push car, rode a short distance on the push car, and said nothing to the children about playing with it. The ground of this complaint appears to be that playing with the push car, when the agent saw them and took part in the sport, and playing on the turntable, some 500 yards distant, were independent transactions, and the agent could not reasonably anticipate that they would go to the turntable from the place he left them, and therefore was not required to warn them of its danger. It seems to us that the station grounds as a whole were dangerous premises, especially for children of that age. The turntable was only one of its many dangers. The evidence objected to, it seems to us, was competent to show that the defendant had knowledge that children frequented these dangerous premises, and that they did so with its knowledge and consent. We think there was no error in the admission of this testimony.

Certain impeaching questions were addressed to one of the defendant's witnesses which were objected to by the defendant on the ground, among others, that no foundation had been laid. Before the questions were asked, the defendant's attention was directed to the time and place where the contradictory statements were made, and to the persons in whose presence they were made. Taken in connection with his testimony on direct examination, the witness could not fail to understand to what the questions related. We think the foundation was sufficient, and that his answers, some of them showing that he had made contradictory statements, were properly admitted.

We recommend that the judgment of the district court be

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reversed, and the cause remanded for further proceedings according to law.

AMES and DUFFIE, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings according to law.

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FLORIDA CENT. & P. R. CO. *v.* BERRY.

(*Supreme Court of Georgia, July 23, 1902.*)

[42 S. E. Rep. 371.]

**Carriers—Delay in Transporting Goods—Excuses.**

Where an owner of goods delivers them to a railroad company to be shipped to a designated point, and a bill of lading is issued to the owner, in which he is named as both shipper and consignee, and which contains the words, "notify" a third person, it is the duty of the railroad company, unless otherwise instructed by the owner, or by some holder of the bill of lading properly indorsed, to transport the goods within a reasonable time, to the point of destination mentioned in the bill of lading. The company will not be relieved of liability to the owner for loss occasioned by a failure to comply with this obligation by showing that the failure to deliver the goods at the point of destination within a reasonable time was due to instructions not to deliver, given by the person whom it was directed in the bill of lading to notify of the arrival of the goods at their destination, who, at the time of such instructions, was not in possession of the bill of lading nor entitled to its possession. Such persons could not acquire any title to the goods or right to control the shipment until he came into possession of the bill of lading properly indorsed by the consignor.

(Syllabus by the Court.)

Error from city court of Richmond county; W. F. Eve, Judge.

Action by J. M. Berry against the Florida Central & Peninsular Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jos. B. & Bryan Cumming, for plaintiff in error.

J. R. Lamar, for defendant in error.

COBB, J. This was an action by Berry to recover damages from the railroad company for a failure to deliver within a reasonable time two car loads of bran shipped from Augusta, Ga., to Tampa, Fla. A bill of lading was issued to Berry, in which he was named as both shipper and consignee, but which contained the words, "Notify Phillips & Fuller." The bill of lading was indorsed by Berry, and attached to drafts upon Phillips & Fuller, which were sent for collection to a bank at Tampa. These drafts were not paid. At the trial the railroad company offered evidence tending to show that the failure to deliver the bran in Tampa was due to instructions given to it by Phillips & Fuller, and that it could have delivered the bran at Tampa within a reasonable time if it



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had not been for these instructions. The court rejected this evidence, and this is assigned as error. It is therefore necessary to determine what control, if any, Phillips & Fuller had over this shipment before they paid the drafts attached to the bill of lading. The contract contained in the bill of lading was an agreement on the part of the railroad company to carry the goods to Tampa, Fla., within a reasonable time and nothing short of this was a compliance with the contract. See Hutch. Carr. (2d Ed.) § 328. If the carrier had transported the goods to Tampa within a reasonable time, it would have complied with its contract. Until it had done this, Phillips & Fuller had no connection at all with the transaction. Under the contract made with the railroad company Berry retained title to the goods shipped, and Phillips & Fuller could not acquire title to the same until the goods were delivered, and paid for by them. See *Erwin v. Harris*, 87 Ga. 333, 336, 13 S. E. 513. The direction in the bill of lading to notify Phillips & Fuller was, in effect, an instruction to the company to advise them that the goods had reached their destination; and until the goods had reached their destination no notice to Phillips & Fuller was required, and until that time they had no concern with the transaction. The carrier should have transported the goods to Tampa, the place of destination; and, if Phillips & Fuller failed or refused within a reasonable time to appear with the bill of lading properly indorsed and receive the goods, the railroad company could have stored the goods in Tampa, and held the same at the risk of Berry, its liability from that time on being simply that of a warehouseman. *Railway Co. v. Pound*, 111 Ga. 6, 36 S. E. 312; Hutch. Carr. (2d Ed.) § 368 et seq. Even if the goods had reached Tampa within a reasonable time, Phillips & Fuller, under the stipulations in the bill of lading, would have had no right to receive or otherwise control the property shipped until they presented the bill of lading indorsed by Berry. *Boatman's Sav. Bank v. Western & A. R. Co.*, 81 Ga. 221, 7 S. E. 125; Hutch. Carr. (2d Ed.) § 121b. There was no error in rejecting the evidence. The fact that Berry, after notice to him that the goods had not been transported to Tampa, still insisted upon the payment of the drafts by Phillips & Fuller, would not relieve the railroad company from liability to him for a failure to transport the property within a reasonable time. Such was the undertaking of the company, and Berry had a right to expect that the contract would be complied with. Neither would the railroad company be relieved from liability by showing that the goods had been transported to a point near Tampa, but not at the place of destination in Tampa, and there held subject to delivery in Tampa whenever Phillips & Fuller should so require. Under the bill of lading Phillips & Fuller had no right to take control of the goods shipped until after the drafts attached to the bill of lading were paid. The railroad company, under

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the terms of the contract, was to treat Berry as the owner of the goods until some one appeared with the bill of lading indorsed, demanding delivery of the property. Berry, as the owner of the goods and the consignee in the bill of lading, had a right to demand of the railroad company that the goods be carried to their point of destination within a reasonable time. The railroad company had no right to deal with Phillips & Fuller, nor was it under any obligation to notify them of anything, until the goods had been safely transported to the point of destination at Tampa, Fla. There was no error in the rulings complained of.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

## GREAT NORTHERN RY. CO. v. COATS.

(Circuit Court of Appeals, Eighth Circuit, April 14, 1902.)

[115 Fed. Rep. 452.]

**Railroads—Fire from Locomotive—Evidence—Burden of Proof.\***

Where fire is shown to have started from sparks from a passing locomotive, the burden is on the company, in an action for damages, to show that the locomotive was properly constructed, equipped, and operated.

**Same—Sufficiency of Evidence—Jury Question.**

Where it clearly appeared that a fire was started on the right of way of a railroad by a passing locomotive, which extended to and destroyed adjoining property, and the company, on the trial of an action against it, produced testimony, which was not directly contradicted, tending to show that the locomotive was properly constructed, equipped, inspected, and operated, *held*, that it was the province of the jury to determine whether the presumption of negligence, created by the starting of the fire, was overcome, since the jury had the right to weigh the testimony and to determine whether the witnesses for the company were credible.

**Same.**

The engineer and fireman, who were the principal witnesses for the company in an action for fire started by sparks from their locomotive, testified that, at the time or immediately after the locomotive passed the place where the fire was set, the front and rear dampers were closed; that the former had not been opened; that the screen netting in the smokestack was in place; that there was no opening in the ash pan through which fire could escape; that the steam was shut off; and that it was running on acquired momentum at the rate of 15 miles an hour. Plaintiff's evidence tended to show that, before reaching the place where the fire started, the locomotive was climbing a grade under forced draft, and that it had acquired such a momentum that it could run a quarter of a mile up grade with steam shut off and dampers closed, which was contended to be negligent on a windy day, when in proximity to combustible materials: *held*, that the court could not say, as a matter of law, that the locomotive was properly operated.

**Same—Instructions.**

Where there was no evidence in an action against a railroad for set-

\*As to the burden of proof in actions for injuries by fires set by locomotives, see foot-note appended to *Illinois Cent. R. Co. v. Barret* (Ky.), 2 R. R. R. 566, 25 Am. & Eng. R. Cas., N. S., 566.

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ting a fire by its locomotives that the fire started on plaintiff's land, outside of furrows plowed by him on the margin of the right of way, and where he had directed defendant's sectionmen not to burn grass outside the furrows, it was not error to modify an instruction requested by defendant, that plaintiff could not recover if the fire caught outside of the furrows, by the additional requirement that it must also appear that the train was properly managed.

**Same—Directions to Sectionmen.**

A direction by the owner of land adjoining a railroad right of way to railroad sectionmen not to burn grass on his land, but which does not direct them not to remove the grass in some other way, does not relieve the company from liability for setting fire thereto by its locomotives.

**Same—Instruction—Velocity of Wind.**

An instruction in an action for fire started by sparks from a locomotive that the velocity of the wind might be taken into consideration was not erroneous, in failing to state how and in what manner the velocity of the wind could be considered.

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of South Dakota.

W. E. Dodge (A. B. Kittredge, C. Wellington, and Charles S. Albert, on the brief), for plaintiff in error.

C. S. Palmer (Frank R. Aikens and H. E. Judge, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This action was brought by Clark G. Coats, the defendant in error, against the Great Northern Railway Company, the plaintiff in error, to recover the value of certain property, consisting of a dwelling house, two barns, and a quantity of farming utensils and machinery, which, as he alleged, were destroyed on April 26, 1899, by a fire which was set out on the defendant company's right of way by sparks, cinders, and coals which were emitted by one of the defendant company's engines. The complaint charged, in substance, that the defendant company carelessly and negligently permitted grass, weeds, bushes, hay, stubble, and other combustible materials to grow and accumulate upon its right of way at the place where the fire originated, and on the day last aforesaid, by its servants, agents, and employees, in running and operating its engines and trains over its railway at said place, carelessly and negligently set fire to said grass and other combustible materials there permitted by said defendant to accumulate, by said engine emitting and discharging sparks, cinders, and live coals, thereby igniting said grass and other combustible materials, which said fire was, through the defendant's carelessness and negligence, set upon its right of way, and, being so set, was, through the defendant's carelessness, permitted to extend from its right of way to the plaintiff's premises, and, by so extending, consume a large quantity of the plaintiff's property, which was situated on a tract of land adjoining the right of way. We quote the

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above from the complaint, using substantially the language of the pleading. There was a verdict below in favor of the plaintiff for the sum of \$11,000, and the case is before this court for review, various errors having been assigned.

At the conclusion of the case the defendant company moved the court to withdraw from the jury the issue as to the manner in which the engine that occasioned the fire was operated and managed, for the reason, as stated in the motion, that the uncontradicted evidence tendered by the defendant company relating to the management of the engine "is so clear and circumstantial that no reasonable person can doubt its verity." The court overruled the motion, and its action in that behalf is the first alleged error to which our attention is directed.

Preliminary to a discussion of this point, it should be observed that the testimony for the plaintiff below showed that the fire started on the defendant's right of way about 1:30 p. m., and not over a minute or two after the engine and train which is supposed to have kindled the fire had passed the place where it was discovered; that at that point on the right of way there were some dry weeds and grass, which extended all the way to the plaintiff's buildings; that a high wind was blowing in the direction of the buildings, and that the fire, after it had caught on the right of way in the grass and weeds, ran very rapidly to the plaintiff's barns and dwelling house, and destroyed them before much of the contents could be removed. In view of the testimony, it is manifest that the fire was kindled by coals, sparks, or cinders which were emitted or dropped by the defendant company's engine; and there was sufficient evidence to warrant the jury in finding that some combustible material, such as dry grass and weeds, had been permitted to accumulate on the defendant's right of way, and that the fire started therein on the right of way. It follows, therefore, that the testimony in question not only created a presumption of negligence on the part of the defendant company, but, in so far as it showed that the company had allowed combustible material to accumulate on its right of way, it established a specific act of negligence, to which the injury complained of might well be attributed. *McCullen v. Railway Co.*, 41 C. C. A. 365, 101 Fed. 66, 70, and cases there cited; *Eddy v. Lafayette*, 1 C. C. A. 441, 49 Fed. 807; *Id.*, 163 U. S. 456, 466, 16 Sup. Ct. 1082, 41 L. Ed. 225; *Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co.* (decided at the present term) 114 Fed. 133.

Learned counsel for the railroad company do not controvert these propositions, but they assert that the trial court should have told the jury, in substance, that the engine was properly managed, and that the company was guilty of no negligence in that respect, and that a reversible error was committed in not eliminating that issue from the case.

We think that these propositions are untenable. The testimony introduced by the plaintiff, that his property had been

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destroyed by a fire kindled on the right of way of the railroad by coals, cinders, or sparks emitted by a passing locomotive, if the jury believed such to be the fact, as they must have done, cast on the defendant company the burden of overturning the presumption of negligence thus raised; that is to say, the burden of showing that the locomotive was properly handled or operated, and that due care had been exercised in the construction and equipment of the same and in keeping it in repair, so as to prevent the emission of cinders and sparks, so far as that end could be attained without impairing its efficiency. *McCullen v. Railway Co.*, 41 C. C. A. 365, 101 Fed. 66, 70. This presumption could only be overcome by testimony, and, unless we apply to this class of cases a rule different from that which is applied in other cases, it was the province of the jury to determine the weight that should be accorded to the testimony which was introduced for that purpose, and also to determine the credibility of the witnesses who testified on that subject. It was well said by the supreme court of Minnesota in *Karsen v. Railroad Co.*, 29 Minn. 12, 15, 11 N. W. 122, when construing a statute of that state which makes the scattering of fire by a locomotive engine prima facie evidence of negligence:

“Neither is a jury necessarily bound to accept as conclusive the statement of a witness that an engine was in good order or carefully and skillfully operated, although there is no direct evidence contradicting the statement. They have a right to consider all the facts and circumstances in evidence bearing upon the condition or mode of operating the engine, and upon the accuracy of witnesses.”

It was further said, in substance, in the same case, that the statute under consideration creates a disputable presumption of negligence on the part of a railroad company, when it appears that one of its locomotive engines has set out a fire which has destroyed adjoining property; that the effect of the statute is (this latter fact being shown) to cast upon the company the burden of proving affirmatively that it has done its duty, and was not in fact guilty of any negligence; that it must do this by satisfactory evidence, as in any other case where one holds the burden of proof; and that if a jury finds against the company, deciding that the presumption of negligence has not been overcome, it is within the power of the trial court, and its right and duty, as in other cases, to set aside the verdict, if it is of the opinion that it was not justified by the evidence. We cannot well understand upon what theory the statement of persons, who were in charge of a locomotive when it occasioned a disastrous fire, that it was properly and prudently managed, etc., must be accepted by a court as conclusive, and as overturning, as a matter of law, the presumption of negligence raised by other testimony. It would seem, rather, that the triors of the fact ought, in such a case, to consider how far the interest of such witnesses—



their natural desire to absolve themselves from all blame—may have colored their evidence, and how far their statements are consistent with other facts and circumstances which have been proven. If a court undertakes to weigh such evidence, and say that the witnesses are credible, and also to decide as to the effect of the proof, it plainly assumes the functions of the jury, or at least a function which is discharged by the jury in other cases.

Our attention has been called by learned counsel for the plaintiff in error to the case of *Menomonie River Sash & Door Co. v. Milwaukee & N. R. Co.*, 91 Wis. 447, 65 N. W. 176, 179, where the reporter says in the syllabus that the inference of negligence arising from the fact that a fire was set by sparks from a locomotive is overcome by undisputed evidence that the engine was properly constructed and equipped, and was carefully inspected the day before the fire, and found to be in proper order, and was properly managed. But it is important to note that in that case the court said that the manner in which the fire was occasioned was not observed by any one, but was wholly a matter of inference, and that in that respect the case before it differed from other cases decided by the same court, namely, *Kurz & Huttenlocher Ice Co. v. Milwaukee & N. R. Co.*, 84 Wis. 171, 53 N. W. 850, and *Stacy v. Railway Co.*, 85 Wis. 225, 54 N. W. 779, in which latter cases it was expressly decided that it was erroneous to withdraw from the jury the question respecting the negligent construction and operation of an engine, where it appeared that a fire started on the track shortly after an engine passed, although the company did produce witnesses who testified that the engine was provided with the most approved appliances to prevent the escape of fire, and was properly handled. If we should adopt the doctrine of the Wisconsin case first above cited (*Menomonie River Sash & Door Co. v. Milwaukee & N. R. Co.*), it would not fit the case in hand, because in this case the fire originated on the defendant's right of way, in the weeds or grass, and was discovered not over a minute, as the plaintiff below said, after the train passed, and was evidently occasioned by sparks or cinders dropped by the locomotive. According to the Wisconsin decisions, therefore, the issue as to the skillful operation of the locomotive on the occasion of the fire was properly submitted to the jury.

In addition to the considerations aforesaid, which are ample, in our judgment, to show that the trial court committed no error in the respect now claimed, it will be profitable to refer to the testimony bearing upon the issue concerning the operation of the train.

The defendant company relied principally upon the testimony of its engineer and fireman, who testified, in substance, that, about the time or immediately after the engine passed the point where the fire was kindled, both the front and the rear dampers of the engine were closed; that the front

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damper had been closed from the time the train left Yankton; that the screen netting in the smokestack was down or in place; that there was no opening about the ash pan from which fire could have escaped; that the steam was shut off; and that thereafter the train was running on its acquired momentum at the rate of about 15 miles per hour, which was sufficient to carry it up an incline beyond the point where the fire occurred, and down the other side into the city of Sioux Falls. On the other hand, counsel for the defendant in error direct attention to evidence which shows that, for some distance before reaching the place where the fire was set, the train had been climbing an up grade on a curve, under a forced draught, and that by so doing it had acquired such a momentum that, with the steam shut off and all the dampers closed, it was able to run more than a quarter of a mile beyond the place where the fire was set, on an up grade, before reaching the crest of the hill. It is claimed that these facts tend to show that the train was not operated with the degree of care that ought to have been exercised on a very windy day, past a place where there was considerable combustible material on the right of way, and buildings near by. We refer to this testimony, and the contentions made with reference thereto, mainly for the purpose of saying that in the light thereof the trial judge was not bound to decide, as a matter of law, that the trainmen had told the truth, that the engine was skillfully handled on the occasion of the fire, and that no negligence could be imputed to the defendant company in that respect. This was a question for the jury to determine in the light of all the circumstances of the case, as well as the question whether the defendant company had permitted combustible material to accumulate on its right of way. The burden being on the defendant company, as before shown, to prove affirmatively that it had operated its engine in a proper manner, we are not able to say that the proof relied upon to establish the skillful management of the engine was so clear and circumstantial as to remove all doubt on that point in the mind of a reasonable person. But even if this issue had been eliminated from the case, it was still the province of the jury to determine, as counsel for the plaintiff in error are compelled to concede, whether the defendant company had not been guilty of negligence which occasioned the injury, in permitting combustible material to accumulate on its right of way. It is most probable, we think, that the defendant company was held responsible for the fire for that reason.

Counsel for the plaintiff in error argue two other assignments of error relating to the instructions, which are all that require special notice.

There was some evidence at the trial that on one occasion before the fire the plaintiff below plowed certain furrows east of the railroad track, and along the margin of that part of the



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right of way where the fire originated, telling the defendant's sectionmen at the time not to burn the grass and weeds east of these furrows, as he had sown some tame grass east of them, which he did not care to have destroyed, or words to that effect. In view of this testimony, the defendant company asked the court to instruct the jury, in substance, that if the plaintiff plowed these furrows on the east side of the railroad track, and forbade the sectionmen to burn east of them, and if they found that the fire originated east of the furrows, then the plaintiff could not recover. The court gave this instruction, with the modification that, on the state of facts supposed, the plaintiff could not recover, provided the engine and train were carefully and properly managed. Counsel for the plaintiff in error complain of this modification of their request, but we are of opinion that no error was committed in this respect—First, because there seems to have been no testimony that the fire originated in the grass east of the furrows; and, second, if there had been such evidence, and if it also appeared that the fire was occasioned by the negligent handling of the engine, we perceive no reason why the defendant should not have been held accountable. Because the plaintiff ordered the sectionmen not to burn the grass outside of the furrows and on his own land, where he had sown tame grass, it does not follow that the company had the right to kindle a fire east of the furrows by the negligent operation of one of its trains. Besides, even if he did give the sectionmen orders not to destroy the grass outside of the furrows by burning, he appears to have made no objection to their removing such grass or weeds in any other way,—as by cutting them down. There is no merit in this assignment, nor is it one of any importance.

Furthermore, the lower court instructed the jury that, in determining whether the defendant company exercised ordinary care on the occasion of the fire, "the velocity of the wind may be taken into consideration," and this latter excerpt from the charge is criticised. If we fully comprehend the nature of the criticism, it is that the statement, as made, was too general; that the jury should have been advised exactly how and in what manner they might take the velocity of the wind into account; and that, because this was not done, the defendant was prejudiced. We are not able to concur in that view. Jurors, as well as judges, are presumed to know that railroad trains do and that they must run on windy as well as on other days, and that a railroad company is not negligent merely because it operates a train in a high wind. We have no reason to suppose that the jury failed to comprehend what was in the mind of the court, namely, that more care ought to be exercised in handling fire on a windy day than on a calm day, and that, in determining whether the defendant had exercised due care on the occasion in question, they might very properly take into account the force of the wind on that day.

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Upon the while, we have failed to find that the trial court committed any error on the trial of this case which would warrant a reversal of the judgment below, and it is therefore affirmed.

SANBORN, Circuit Judge (dissenting). The serious question in this case is whether or not it was the duty of the court to withdraw from the jury the issue whether or not the company failed to exercise ordinary care in the management and operation of its locomotive, because the evidence that it was not guilty of such want of care was so clear and circumstantial that no reasonable person could doubt its verity.

There was evidence from which the jury might properly infer that the fire was set by sparks or coals from the locomotive. It is a general rule of evidence, which has been adopted by this court and by the supreme court of South Dakota,—the state in which this case was tried,—that the scattering of coals or sparks of fire by a locomotive raises a presumption that there was either a defect in the engine, or negligence in its operation. *Kelsey v. Railway Co.* (S. D.) 45 N. W. 204, 207. But this is not a conclusive presumption of law. It is only a disputable legal or artificial presumption of fact which has been adopted by the courts, *ab inconvenienti*, for the purpose of changing the burden of proof, because it was so difficult for the plaintiffs to establish in the first instance defects in the locomotives, or negligence in the operation of the engine of railway companies. In *Smith v. Railroad Co.*, 3 N. D. 17, 22, 53 N. W. 173, the supreme court of that state announced the real reason and the true legal effect of this rule in these words:

“But to prevent a denial of justice some of the courts have created an artificial presumption of negligence, to the end that the defendant may be compelled to produce the witnesses who are familiar with the facts on which the issue of negligence depends, that they may be subjected to full and searching cross-examination on all the phases of the case,—on all the possible grounds of negligence. Some courts have refused to go so far. To extend this presumption of negligence beyond the reason for its existence would be irrational. It summons defendant to show that there was no negligence, and the evidence must fully meet every possible ground of negligence under the circumstances and the pleadings. But when the whole case, independently of this artificial presumption, shows that there was no negligence, the presumption cannot be considered for the purpose of making an issue for the jury. It has fully served its purpose, and can have no other effect. We therefore establish it as the rule in this state that the court must, in the first instance, determine the question whether the inference of negligence arising from the mere setting out of a single fire has been fully overthrown.”

The rule that the scattering of fire raises a presumption of defect in the engine, or negligence in its operation, was sub-

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sequently enacted into a statute in the state of North Dakota. Rev. Codes N. D. § 2984. But even when embodied in that imperative form the supreme court of that state adhered to its rule. It said:

“Setting the fire is made presumptive evidence of such defects or negligence. But this court is fully committed to the principle that whether or not such statutory presumption is overcome by evidence introduced by the defendant is, in the first instance, a question of law for the court (*Smith v. Railroad Co.*, 3 N. D. 17, 53 N. W. 173), and also to the further position that when the proper employees of the defendant railroad company have gone upon the stand, and testified that there were no defects in the construction or equipment of the engine, and no negligence in its operation, making their testimony at all points as broad as the presumption, then, as matter of law, such presumption is overcome. Evidence of that character was introduced by the defendant in this case.” *McTavish v. Railway Co.*, 79 N. W. 443, 446.

The same rule prevails in the state of Minnesota, under a similar statute. Thus, while in the *Karsen Case*, cited in the opinion of the majority, the supreme court of Minnesota held that the evidence for the defendant in that particular case had not satisfactorily overcome the presumption, it as clearly declared that it was a question of law for the court whether or not the evidence had done so, and that whenever it had that effect there was no question left for the jury, and it was the duty of the court to withdraw the issue from their consideration. That court said:

“We do not think or hold that the mere fact that the fire was set by an engine has such an effect as direct evidence of negligence if the otherwise uncontradicted evidence on the part of the railroad company showed satisfactorily that it had fully performed its duty in the premises. And if a jury should so find, it would be the right and duty of the court to set aside the verdict, as in any other case where it was not justified by the evidence.” *Karsen v. Railway Co.*, 29 Minn. 14, 15, 11 N. W. 122.

To the same effect are *Spaulding v. Railroad Co.*, 30 Wis. 110, 123, 11 Am. Rep. 550; *Id.*, 33 Wis. 582; *Huber v. Railway Co.*, 6 Dak. 392, 43 N. W. 819; *Koontz v. Navigation Co.* (Or.) 23 Pac. 820; *Railroad Co. v. Talbot*, 78 Ky. 621; *Railroad Co. v. Packwood*, 7 Am. & Eng. R. Cas. 584; *Railroad Co. v. Reese*, 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66.

Nor is this rule variant from that which ordinarily obtains when uncontradicted evidence meets a disputable presumption of fact. Lawson, in his *Law of Presumptive Evidence*, at page 661, says:

“Primarily, the rebuttable legal presumption affects only the burden of proof; but, if that burden is shifted back upon the party from whom it first lifted it, then the presumption is of value only as it has probative force, except it be that on

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the entire case the evidence is equally balanced, in which event the arbitrary power of the presumption of law would settle the issue in favor of the proponent of the presumption."

In *Bryant v. Railroad Co.*, 4 C. C. A. 146, 53 Fed. 997,—an action for negligence resulting in death,—it appeared at the first trial that the deceased was riding on a passenger car of the defendant on its railroad when he was killed, and there was no rebutting testimony. This court held that the fact that he was riding on the passenger car upon the railroad raised a presumption that he was a passenger, and reversed the court below because it directed a verdict for the defendant. The same fact was proved at the second trial, and the same presumption arose, but it was then rebutted by uncontradicted evidence that a yard master who was without authority to do so was operating the passenger car without the knowledge of the railroad company when the deceased was killed. At this second trial the court below had submitted the case to the jury, and the railroad company was met in this court by the proposition that, since the presumption had once arisen in the case that the deceased was a passenger, it remained and constituted some evidence for the consideration of the jury, and therefore prohibited the court from taking the issue from them. But this court said:

"A presumption of fact, like that which the counsel for the defendant in error here invoke, is a mere inference from certain evidence, and, as the evidence changes, the presumption necessarily varies. A trial court is not bound to disregard a conclusive presumption which arises from all the evidence at the close of a case because at some time in the course of a trial counter presumptions arose. Possession of real estate raises a presumption of title, but, when a legal title is proved in another, a conclusive presumption arises from all the evidence that the latter is the owner, and the court must so direct. Possession of a horse raises the presumption of ownership, but the uncontradicted evidence of competent witnesses that the horse is the property of another, and that the possessor secretly took him from his owner without right, raises so conclusive a presumption of ownership in the latter that the court might be bound to disregard the first presumption from possession, and the possession itself might raise a presumption of larceny."

And we reversed the judgment below, and held that it was the duty of the trial court to take the question whether or not the deceased was a passenger from the jury, notwithstanding the fact that the presumption that he was so arose from the plaintiff's evidence. *Railroad Co. v. Bryant*, 13 C. C. A. 249, 256, 65 Fed. 969, 975, 976. The presumption of negligence in the operation of a locomotive which arises from the fact that it scatters sparks or coals or sets a fire is neither more sacred nor more conclusive than the presumption of ownership which arises from the possession of property, or the pre-

sumption of the relation of one riding in a car to a carrier which arises from his riding on its railroad in its passenger car, or from any other disputable presumption of fact; and it ought to receive no different measure of consideration.

The supreme court of the state of South Dakota (the state in which the case at bar arose, and in which it was tried) has adopted the rule which prevails in North Dakota, Minnesota, and many other states,—the rule that it is always, in the first instance, a question of law for the court whether or not the presumption of defects in a locomotive, or of negligence in its operation, arising from the setting of a fire or the scattering of sparks or coals, is overcome by the testimony of due care introduced by the defendant, and that if the uncontradicted evidence of its proper employees is that there were no defects, or that there was no negligence in the operation of the locomotive, and that testimony is as broad as the presumption, the presumption is overcome, as a matter of law, and it is the duty of the court to withdraw the issue from the jury. Thus, in *Kelsey v. Railway Co.*, 45 N. W. 204, 207, that court said:

“The plaintiff, by proving that the defendant's locomotive engine had set fire to dry grass or other combustible matter along its roadbed, made a *prima facie* case of negligence; and, had defendant failed to introduce any proof, the plaintiff would have been entitled to a verdict in his favor, under the direction of the court. But the defendant did introduce its employees who were engaged in running the train at the time, and the master mechanic having charge of the repairs of the engines of the road for that division, who testified that this particular engine was in good order, and had the modern appliances attached to it to prevent the emission of sparks and the dropping of live coals of fire, and that the engine was run with the usual care and caution at the time the fire started. This evidence rebutted the presumption raised by the plaintiff's proof, and, had there been no other evidence of negligence, the defendant would have been entitled to a verdict from the jury under the direction of the court.”

This rule that the presumption of negligence from the setting of a fire is, as a matter of law, overcome by the uncontradicted testimony of witnesses that due care was exercised, is a rule of evidence, a rule of practice, a rule which simply measures the force and effect of a disputable presumption of fact in the trial of fire cases in the states of South Dakota, North Dakota, Minnesota, and perhaps in other states; and in those states it ought to and does obtain in the federal courts, as well as in the state courts, because it is a just and rational rule, and because the act of congress provides that the practice, forms, and modes of proceeding in actions at law in the national courts shall conform, as near as may be, to the practice, forms, and modes of proceeding existing at the time in like causes in the courts of record of the state within which the federal courts are held. Rev. St. § 914.



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The result is that it was, in the first instance, a question of law for the court below in this case whether or not the presumption of negligence in the operation of the defendant's locomotive, which arose from the scattering of the sparks or coals and the setting of the fire, was overcome by the testimony for the defendant; and if the testimony of its proper employees that there was no negligence in the operation of the engine was uncontradicted, and was as broad as the presumption, then that presumption was overcome, as a matter of law, and it was the duty of the trial court to withdraw this charge of negligence from the consideration of the jury on the motion of the defendant.

Turning to the evidence, and testing it by this established rule, the testimony of the engineer and fireman that the engine was carefully and properly managed and operated is found to be as complete and as broad as the presumption; and, unless it can be said to be contradicted in some material part, it entitled the defendant to a withdrawal of this issue from the jury. Where was the contradiction? The only evidence that is claimed to have any such effect is testimony that, "for some distance before reaching the place where the fire was set, the train had been climbing an up grade on a curve, under a forced draught," and that "by so doing it had acquired such a momentum that with the steam shut off, and all the dampers closed, it was able to run more than a quarter of a mile beyond the place where the fire was set, on an up grade, before reaching the crest of the hill." But to my mind there is nothing in this evidence which tends in the least degree to prove that this locomotive was not operated with reasonable care; nothing to show that this method of operation was not more reasonable and careful than it would have been to have driven it puffing slowly up the hill past the property of the plaintiff, thus giving longer time and more opportunity for fire to escape and ignite the combustible material in the vicinity. The locomotive was attached to a train. The defendant had the right to draw this train around the curve and up the grade with its engine, and to use the necessary draught and fire to accomplish this purpose. The legal presumption is that it operated the locomotive and used the draught and the fire in a careful and proper manner. This presumption is strengthened by the uncontradicted testimony of its employees. No witness comes to say that it did not do so, nor that its engine was not driven up the hill with ordinary and reasonable care. The suggestion that it was not so driven comes, not from the testimony of any witness, but from the mere argument of counsel, with no witness to support it. In this state of the case, the testimony of the proper employees of the company seems to me to have been uncontradicted, and to have overcome the presumption of negligence in operating the locomotive which arose from the setting of the fire, so that this charge of negligence ought to have been withdrawn from the jury.

**CENTRAL OF GEORGIA RY. CO. v. FREEMAN.***(Supreme Court of Alabama, June 28, 1902.)*

[32 So. Rep. 778.]

**Accident at Crossing—Negligence—Pleading.**

A count alleging that defendant's servant, knowing that by running the train at a rapid rate of speed on the street crossing great personal injury would likely be caused, wantonly and intentionally did so, and, as a proximate consequence thereof, plaintiff was injured, did not state a cause of action.

**Same—Same—Same.**

A count alleging that defendant's servant, knowing that many people were likely to be crossing the track at the street crossing, and that the failure to ring the bell or blow the whistle, as required by statute, wantonly and intentionally failed to do so, and, as a proximate consequence thereof, plaintiff was injured, did not state a cause of action.

**Same—Contributory Negligence and Failure to Signal—Pleading.\***

In an action against a railroad for injuries received at a crossing, where the failure of the engineer to ring the bell or blow the whistle was alleged as negligence, a plea that plaintiff did not stop and look and listen before attempting to cross the track was good.

Appeal from circuit court, Jefferson county; A. A. Coleman, Judge.

Action by Robert A. S. Freeman against the Central of Georgia Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

The complaint contained five counts, in each of which the plaintiff claimed \$20,000. In each of the counts it was averred that the plaintiff was run over by a train operated by the defendant, while he, the plaintiff, was on the public highway in Alexander City; that by reason of being so run over, he lost a part of both feet, and was otherwise injured and crippled for life. The negligence averred in each of the counts was as follows: "First count: Plaintiff alleges that defendant negligently caused or allowed said engine or train to run upon or against plaintiff, as aforesaid. Second count: The engineer or other person having control of the running of said locomotive negligently failed to blow the whistle or ring the bell at least one-fourth of a mile before reaching the crossing of said railway with said street, which crossing was a public road crossing, or negligently failed to blow the whistle or ring the bell at short intervals until said locomotive had passed said crossing, as required by section 3440 of the Code of Alabama. Third count: The engineer or other person having control of the running of said locomotive negligently failed to blow the whistle or ring the bell at least one-fourth of a mile before reaching a regular station or stopping place on said railway, or negligently failed to continue to blow the whistle or ring the bell at short intervals until said engine

\*See foot-note appended to Chicago, I. & L. Ry. Co. v. Reed (Ind.), 3 R. R. R. 627, 26 Am. & Eng. R. Cas., N. S., 627.



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had reached said station or stopping place, as required by section 3440 of the Code of Alabama; said station or stopping place being the depot of said company at said Alexander City. Fourth count: Defendant's servant or agent upon said engine or train, with knowledge or notice that by running said train at a rapid rate of speed to and upon the crossing of said street, great personal injury would likely be caused to persons upon said crossing, wantonly or intentionally ran said train to or upon said crossing at a rapid rate of speed, and as a proximate consequence thereof said engine or train ran upon or against plaintiff, and he suffered the injuries and damage set out in the first count of this complaint. Fifth count: Defendant's servant or agent upon said engine or train, with knowledge or notice that many people were likely at all times to be crossing the track of said railway upon said street at said crossing, and that the failure to ring the bell or blow the whistle, as required by section 3440 of the Code of the state of Alabama, in approaching said crossing, wantonly or intentionally failed to ring the bell or blow the whistle, as required by said law, while approaching said crossing, and as a proximate consequence thereof said engine or train ran upon or against plaintiff, and inflicted the injuries and damage set out in the first count of this complaint." To the first count of the complaint, and to each count thereof, the defendant demurred upon the ground that they did not set out a cause of action, or did not state facts showing the negligence complained of. To the second and third counts the defendant demurred upon the ground that each of said counts fails to allege how the failure to blow the whistle or ring the bell before reaching the crossing caused the injuries complained of. To the fourth and fifth counts the defendant demurred upon the ground that the facts set up therein state no cause of action against the defendant. The demurrers to each of the counts were overruled. Thereupon the defendant pleaded the general issue, and several special pleas, setting up the contributory negligence of the plaintiff. One of these pleas was as follows: "(3) For further answer to each count of the complaint, separately and severally, defendant says it was the duty of plaintiff to stop, look, and listen before going upon or attempting to cross defendant's said track, and defendant avers that plaintiff did not stop and look and listen before going upon or attempting to cross said track; and defendant avers that the negligence of the plaintiff in this regard contributed proximately to produce the injuries complained of." To each of the special pleas setting up the contributory negligence of the plaintiff the plaintiff demurred, so far as they purported to be in answer to the fourth and fifth counts of the complaint, upon the ground that contributory negligence was no answer to the negligence averred in said counts. The demurrers were sustained. On the trial of the case there were verdict and jury

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assessing the plaintiff's damages at \$6,750. The defendant appeals, and assigns the rendition thereof as error.

John Loudon, for appellant.

Bowman & Harsh, for appellee.

McCLELLAN, C. J. The first, second, and third counts of the complaint allege negligence on the part of the defendant, and that such negligence caused the injuries complained of. The fourth and fifth counts charge nothing; they allege no cause of action against the defendant. *Railway Co. v. Bunt* (Ala.) 32 South. 507. The case should have been tried as if they were not in it. Defendant's pleas of contributory negligence were good against the only causes of action alleged in the complaint. The demurrers to them should have been overruled. The evidence was free from conflict to the proof of those pleas. With them in the case, the defendant will be entitled to the affirmative charge.

Reversed and remanded.

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(*Supreme Court of Nebraska, July 22, 1902.*)

[91 N. W. Rep. 543.]

**Evidence—Speed of Train.\***

A witness accustomed to observing the running of trains, and who observed one at the time of an accident, and noticed its speed, may give his opinion, together with all the facts on which it is based, as to the rate of speed at which the train was running. *Railroad Co. v. Clark*, 42 N. W. 703, 26 Neb. 645.

**Ordinances.**

Proof of adoption of an ordinance of a city is indispensable where objection is made on that ground.

**Contributory Negligence.**

Evidence *held* not to require a peremptory instruction for defendant on the ground of contributory negligence.

**Harmless Error.**

Where the measure of damages is fixed, an incidental mention in the instructions of a penalty for failure to give signals is not prejudicial error.

**Stock, Injuries to—Negligence—Violation of Ordinance—Requiring Signals—Instructions.**

Instruction that a failure to give signals of warning of train, as required by city ordinance, should be considered in deciding as to negligence in killing cattle, is not erroneous because of a failure to repeat, in that connection, an instruction that to authorize a recovery such negligence must be the proximate cause of the damage.

**Same—Violating Ordinance Regulating Speed—Instructions.**

A similar instruction as to running trains faster than an ordinance allowed upheld against a similar objection.

**Instructions.**

Where plaintiff's evidence, if believed, warrants an instruction as

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\*See *McVey v. Chesapeake & O. Ry. Co.* (W. Va.), 13 Am. & Eng. R. Cas., N. S., 788, and note, 799 et seq.

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to the effect of "sudden and unexpected danger," it is not error to give such instruction in proper terms.

**Crossings—Stop, Look, and Listen.†**

In the absence of visible or audible evidence of danger, there is no requirement that a passer stop, as well as "look and listen," before attempting to cross railway track.

**Instructions.**

Not error to refuse to charge that attempting voluntarily to cross in front of a train on the assumption that its speed was no greater than a city ordinance allowed was negligence, where there was no evidence of plaintiff's acting on such assumption.

(Syllabus by the Court.)

Commissioners' opinion. Department No. 1. Error to district court, Dodge county; Grimison, Judge.

Action by Anton Buzicka against the Union Pacific Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

John N. Baldwin and Edson Rich, for plaintiff in error.  
Button & Cook, for defendant in error.

HASTINGS, C. In this case plaintiff in error complains of judgment of the Dodge county district court in favor of one Anton Buzicka and against the railroad company for \$70 and costs for the killing of two heifers upon the company's track by one of its trains. Of all the 30 assignments of error only 13 are now urged. Of these the first three, Nos. 4, 5, and 6, are as to admission of statements as to the speed with which the train was going at the time of the hitting the cattle. No authority is cited by plaintiff in error with regard to this matter. In each instance the witnesses showed familiarity with the locality, and observation of passing trains, and each testified that the train was running from 30 to 35 miles an hour. There seems no objection to taking the opinion of a well-informed witness as to the speed at which a train was going when the witness observed it, where the facts on which such an opinion is based are fully stated, as in this instance. *Railroad Co. v. Clark*, 26 Neb. 645, 42 N. W. 703.

Errors Nos. 8 and 9 refer to the instruction of certain sections of an ordinance relating to railway trains in the city of Fremont, within whose limits the damage occurred. The bill of exceptions is certified to as containing all the evidence offered at the trial. The only reference to this ordinance is found on page 76 of the record, as follows: "Plaintiff offers in evidence Sec. 3. of Ordinance 349 of the city of Fremont, Nebraska, marked 'Exhibit 2.' Mr. Rich: Defendant objects, as incompetent, irrelevant, and immaterial, and as tending to prove no issue in the case, and not supported by any allegation in the petition. (Objection overruled. Exception taken.) Exhibit 2 received, and read in evidence, as follows: 'The bell of each locomotive engine shall be rung

†See foot-note appended to *Lumsden v. Chicago, etc., Ry. Co.* (Tex.), 2 R. R. R. 806, 25 Am. & Eng. R. Cas., N. S., 806.

continually while said locomotive engine is in motion and moving upon any railroad or railway track inside of the city limits.' Mr. Button: We now offer in evidence section four of Ordinance 349, concerning railroads, of the city ordinances of the city of Fremont, Dodge county, Nebraska, marked 'Exhibit 3.' Mr. Rich: Defendant objects, as incompetent, irrelevant, and immaterial, not being supported by any proper allegation in plaintiff's petition. For the further reason that there is no proof as to the validity or authority of the pretended ordinance. (Objection overruled. Exception taken.) Exhibit 3 received, and read in evidence, as follows: 'Sec. 4. No locomotive engine or railroad car shall be propelled at a greater speed on any railroad or railway track in the city than at the rate of six miles per hour.''' The exhibits themselves are not preserved except as they appear above. There is a subsequent reference, in offering a section which was excluded, to a "Revised Ordinance of the City of Fremont." No such book, however, is brought up or proved to exist. As regards section 4, the objection was expressly made that the proof was incompetent, and that there was nothing to establish the validity or authority of the ordinance. As the matter stands in the record here, that is certainly true, and it was error, and prejudicial error, on the part of the trial court to permit the reading of the section in question without proof of its authenticity as a part of an ordinance of the city of Fremont. We are unable to find anything in the record which in any way supplies the defect.

Another error complained of is the refusal to give a peremptory instruction for defendant. This complaint is based on the proposition that the circumstances and the unobstructed view of the track offered to one approaching it when within about 45 feet show that plaintiff did not properly look for passing trains. Plaintiff's brother, who was driving, testifies to looking and listening for trains on approaching the track, and seeing only a freight train towards the east switching, and that his attention was not directed west again until his horses were on the track, when the passenger was coming from the west about a block away at a high rate of speed. He hurried his team across, and the cattle following were struck and killed. Whether his conduct was negligent was a question for the jury, and it was not error to leave that question to them.

It is also complained that the court incidentally told the jury that by a failure to ring the bell or sound a whistle for a street crossing the railway company would incur a "certain penalty." The case of *Railway Co. v. Geist*, 49 Neb. 489, 68 N. W. 640, is cited. That case was one for personal injury, and it was held that an instruction that certain action would render the defendant "criminally liable" was out of place in a civil action, and liable to enhance the damages prejudicially. In this case the measure of damage was fixed. It could be no more than the amount of injury to the cattle, and no less, if

plaintiff recovered at all. While it was, doubtless, improper to call attention to the penalty by this instruction, it is impossible to see how it was prejudicial.

The giving of instruction No. 8—that a failure to ring the bell or sound the whistle might properly be considered in determining whether the defendant was guilty of negligence in killing the cattle—is complained of, because the jury was not told in the same instruction that it would be no evidence of negligence in other respects. The jury had been told that plaintiff must prove negligence of defendant, and that it was the approximate cause of the injury. This instruction No. 8 was correct so far as it went, and was not necessarily misleading. Defendant's counsel were present to add the caution that this was no proof of negligence in other respects, if such caution was needed. The instruction condemned in *Railway Co. v. Krayenbuhl*, 48 Neb. 553, 67 N. W. 447, told the jury that they might infer general negligence in running of trains from such evidence.

Complaint is made because the trial court told the jury that a failure to comply with the ordinance as to the speed of trains would permit an inference of negligence from that fact. This would seem to be a very mild statement of the doctrine that a "violator of the law is ex necessitate negligent." *Jetter v. Railroad Co.*, \*41 N. Y. 154. It is not so strong a statement of the doctrine as is sustained in *Railway Co. v. Rassmussen*, 25 Neb. 814, 41 N. W. 778, 13 Am. St. Rep. 527, cited by defendant. The instruction that such negligence must be the proximate cause of the injury did not need to be repeated in this connection. It is urged that there was error in the court's instruction as to "sudden and unexpected danger." It is not claimed to have misstated the law, but it is urged that there was no evidence on which to base it. Defendant's evidence shows that the unobstructed view is only obtained when one is within about 45 feet of the track. Plaintiff's action in urging the team across on discovery of the train might not be the best possible under the circumstances, but he was entitled to the indulgence due to one who must act in an emergency, and to have the jury so told.

The complaint because the jury were not told that it was the duty of the plaintiff's driver to stop, as well as look and listen, it hardly seems worth while to discuss. Doubtless, as is held in *Brown v. Railroad Co.* (Wis.) 85 N. W. 271, there are no circumstances requiring one who approaches a railroad track to stop and refrain from going upon it. There the court found that the plaintiff recklessly drove his horse in front of an advancing train, which he must have seen in the exercise of ordinary care. But, in the absence of visible or audible evidence of danger, we know of no authority for a requirement that the passer stop, as well as look and listen.

Nor does it seem that there was error in the trial court's refusing to instruct the jury that it is contributory negligence

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to voluntarily attempt to cross in front of a train on the assumption that its speed was not greater than the ordinance permitted. His knowledge of such an ordinance, in any event, would merely go to affect the question of what would be ordinary care, under the circumstances, on his part.

For the error in admitting in evidence without proof of their adoption the two sections of the ordinance as to giving signals and as to the permitted speed of trains, the judgment must be reversed, and the cause remanded.

DAY and KIRKPATRICK, CC., concur.

PER CURIAM. For the reason stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings.

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(*Supreme Court of Alabama, June 28, 1902.*)

[32 So. Rep. 745.]

**Fires Set by Locomotives—Prima Facie Case.\***

Plaintiff, in an action for the negligent setting of fire by sparks from a locomotive, makes out a prima facie case by proof that the fire was set by such sparks, putting on defendant the burden of showing that the engine was properly constructed and equipped and in repair, and was properly managed.

**Same—Evidence.**

On the issue whether fire was set by sparks from a locomotive, the evidence being circumstantial, testimony that it was dry weather is competent.

**Same—Same.**

On the issue whether a locomotive which emitted sparks was properly equipped and handled, evidence that the train it was hauling was a short one, and that the sparks were many and large, is competent.

**Same—Same—Harmless Error.**

A witness testifying for a railroad company, to show that a locomotive was equipped with a proper spark arrester, having testified that sometimes the netting had to be cleaned, and a man would pound it with a piece of iron, was asked on the cross-examination if the iron was not liable to increase the size of the spaces, and answered, "Not unless it is punched; they merely take a piece of iron, and jar it out of the netting, and this would not affect the netting, unless they punched a hole through it": *held*, if there was error in allowing the question, it was harmless; there being no proof that the netting had been punched.

**Same—Same—Same.**

Even if an engineer, who had testified that the more force that is used the greater number of sparks are emitted by a locomotive, and that the train was running 25 or 30 miles an hour, should not have been asked on the cross-examination if it was not a fact that his train was behind time, and he was running faster to make up time, allowing the question was harmless, he having answered simply that he was late.

\*See *Alabama & V. Ry. Co. v. Barrett* (Miss.), 20 Am. & Eng. R. Cas., N. S., 141, and foot-note.



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**Same—Defective Spark Arresters—Opinion Evidence.**

One witness having testified that sparks as large as the end of his little finger were emitted by the locomotive, and another that they were as large as a cowpea, an experienced engineer, who had heard all the testimony, may testify that no engine in proper condition should have thrown sparks as large as a cowpea or as large as a pin head.

Appeal from circuit court, Autauga county; W. D. Denson, Judge.

Action by the Marbury Lumber Company against the Louisville & Nashville Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The defendant pleaded the general issue and contributory negligence. The assignments of error were based upon the evidence and upon the refusal to give the charges requested by the defendant. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the refusal to give them as asked: “(B) The court charges the jury that the plaintiff having failed to show the velocity of the wind or the condition of the atmosphere, the jury cannot infer from the fact of the fire, that the defendant was guilty of negligence.” “(O) The testimony of Engineer Woods that when the engine passed the cotton pen it was handled in a careful and skillful manner, is uncontradicted.” “(L) The court charges the jury that evidence which merely tends to show that the cotton was fired by sparks escaping from the engine, does not cast on the defendant the burden of showing that the engine was properly equipped with the appliances for the prevention of escaping sparks, in use on the best equipped railroads, and was carefully and prudently managed.” “(K) The burden is on the plaintiff, under evidence in this case, to show some positive act of negligence on the part of the defendant in the equipment or management or condition of engine at the time of the fire.” “(C) The court charges the jury that there is no evidence in this case of any unusual fall of sparks at or opposite the place where the cotton was stored.” “(N) I charge you, gentlemen of the jury, as matter of law that the mere fact that the fire originated from sparks emitted from an engine is not sufficient to cast the burden on the defendant to show that its engine was properly equipped and carefully and skillfully managed.”

There were verdict and judgment for the plaintiff, assessing its damages at \$2,678.66. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Thos. G. & Chas. P. Jones and Alex C. Birch, for appellant.

Watts, Troy & Caffey, for appellee.



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HARALSON, J. 1. The principle is well established in this court as a rule of evidence, that in an action against a railroad company to recover damages resulting from fire alleged to have been caused by the negligent escape of sparks from a locomotive running on defendant's road, the burden is on the plaintiff, in the first instance, to show, that the fire was caused by sparks emitted from defendant's locomotive, and when it is shown that the fire was thus caused, which is, when disputed, always a question of fact for the jury, the mere communication of the fire from the railroad engine, is of itself sufficient to raise a presumption of negligence against the company. With this prima facie proof of defendant's liability raised in plaintiff's favor, the burden is then devolved upon the defendant, of showing that the engine alleged to have caused the fire was properly constructed, was equipped with approved devices and appliances to prevent the escape of fire and sparks, was in good repair and prudently managed and controlled; and upon proof of these facts by the defendant, the presumption arising from the mere communication of fire from the engine is rebutted, and the plaintiff cannot recover, without making proof of other specific acts of negligence or want of care on defendant's part. *Railroad Co. v. Reese*, 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66; *Louisville & N. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620.

2. The cotton destroyed was situated in a pen on the right hand or north side of the railroad running towards Birmingham from Montgomery, at which point, it appears the track ran east and west. The pen was about 50 feet 6 inches from the center of the track. A freight train had, only a few minutes before, passed up, when the cotton was discovered to be on fire. The train, as the evidence tended to show, was a short one, consisting of about 15 cars attached to the engine, the grade was ascending at the point, the train was moving rapidly, and the engine was emitting an unusual quantity of sparks, larger than engines generally emit; that the day was clear and rather windy, the wind blowing in the direction of the cotton,—from a southeastern direction and in a north-westerly direction, and there was no fire in any of the houses or structures near the cotton. Here, the witness testifying to these facts for plaintiff, was asked, "Had it been raining the day before the accident, or had it been dry weather?" to which question, he replied, that the weather had been clear for several days. The defendant objected to the question, on the ground that it was irrelevant, incompetent and inadmissible, shedding no light as to what condition the engine was in. The objection was properly overruled. The burden was on the plaintiff, to introduce evidence, to show that the fire originated from the passing engine, and any circumstance tending to show that it did thus originate, was competent. The proof of how the fire originated was entirely circum-

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stantial. If the weather had been clear and dry and not rainy, for several days previous to the accident, it was a circumstance competent to be considered, in connection with the other evidence, as tending to show, that the fire might have originated more readily from the engine, and did so originate, and that if the weather had been rainy and damp, the fire might not have so readily been communicated to the cotton by sparks, the distance it was away from the engine.

3. The witness, Bledsoe, testified that he was within 6 or 8 feet of the track when the engine passed; that there were a good many sparks coming out when the train passed, and a heap of them fell on the platform of the store near by, and were about the usual size. He was asked, "Was it a light train or a heavy train?" He answered that it was a light train, and in answer to another question, he said, he did not count the cars, but there seemed to be 14 or 15 of them. The defendant objected to the question, on grounds, that it called for incompetent and irrelevant evidence, and because the character of the train had nothing to do with the condition of the engine. While the latter objection,—the one relied on to show the incompetency of the evidence, may in point of fact have been true, whether the train was a light or heavy one, in the number of cars of which it consisted, yet if it was a heavy train, consisting of a great number of cars, it is common knowledge, that it would have required a greater expenditure of effort, so to speak, on the part of the engine, and a greater exhaust of steam by it, especially when moving rapidly up grade, than would have been the case, if the train were a short one, requiring less power to move it, a condition when fewer and smaller sparks would likely be emitted, than if the engine were drawing a heavy train. The number and size of the sparks, was a circumstance to be considered in determining whether the train was properly equipped and handled.

4. Becket, as an expert witness for defendant, testified as to the construction of engines and appliances for preventing the escape of sparks—stating that there had been some changes in material in them during the past 20 years, and they had been trying to better them but had not succeeded; said that what he called standard netting was the same as it was, the first time he saw a spark arrester, about 20 years ago; that sometimes the netting had to be cleaned, and a man would pound it with a piece of iron. He was asked on the cross by plaintiff in this connection, "Is not that iron liable to increase the size of the spaces?" He answered, "Not unless it is punched; they merely take a piece of iron and jar it out of the netting, and this would not affect the netting unless they punched a hole through it." There was no proof that the netting had been punched, and if there was error in allowing the question, it was error without injury, since the

question as asked was not answered, and the answer given, was entirely without prejudice to defendant.

5. Woods, the engineer who handled the train at the time of the accident, testified for defendant, that the more force that was used, the greater the number of sparks, and that he was running 25 or 30 miles an hour, when he passed Bozeman—the place the fire occurred. He was asked by plaintiff in this connection,—“Now is it not a fact, that your train was running behind time, and that you were running faster to make up that time?” The defendant objected, on the ground that the evidence called for was incompetent, irrelevant and inadmissible. In *Perdue v. Railroad Co.*, 100 Ala. 539, 14 South. 366, the court stated, that as a matter of law, it cannot be said that any rate of speed of a railroad train, away from those places where the statute regulates it, is negligence per se, and that, whether or not rapid running, at points not regulated by statute, would be negligence, would depend upon the conditions under which it might be maintained. Nor was the fact of being late and running behind time evidence per se of negligence. *Railroad Co. v. Ferguson*, 79 Va. 241; *Railroad Co. v. Kellam's Adm'r*, 83 Va. 851, 3 S. E. 703. But it has been held, in an action for damages for fires alleged to have been caused by a locomotive, that the excessive use of steam is a fact competent to be considered, in determining whether or not the company exercised due diligence in the operation of the train, and on the question as to whether the fire occurred by reason of sparks from the engine. *McCormick v. Railroad Co.*, 41 Iowa, 193; *Home Ins. Co. v. Pennsylvania R. Co.*, 11 Hun, 182; *Railroad Co. v. De Busk*, 12 Colo. 294, 20 Pac. 752, 3 L. R. A. 350, 13 Am. St. Rep. 221. The witness did not answer the question in full, but replied, simply, “I was late,” without stating, that he was “running behind time,” and was “running faster to make up that time,” as he was asked. The answer he made, did not, without more, imply that he was making up time and running faster in order to do so. It was neither favorable nor unfavorable to either party, and, even, if the question ought not to have been allowed, it was without injury to defendant.

6. Thornton, a witness for plaintiff, had testified, that the engine when it passed, emitted sparks as large as the end of his little finger, and Billingslea, that the sparks were as large as a cowpea. Gross, a witness for the plaintiff, an experienced engineer, testified, that he had heard all the testimony in the case about the fire, and how the engine was equipped. He was asked, “If the netting to that engine was such as had been testified to here, and it was in good repair and condition, would it throw out sparks as large as the end of your little finger?” The defendant objected, on the ground, that there was no testimony, that the sparks were as large as the little

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finger of witness. Thornton and Billingslea were allowed to be recalled, each of whom exhibited his little finger to the witness. The witness did not answer the question. But, he was asked another question—"Do you know what size sparks would emit?" He answered, that no engine in proper condition should have thrown sparks as large as a cowpea, and as large as a pin head, and to this question and answer no objection was made. We find no error here.

7. The court gave several charges requested by defendant, and refused several. The vices of those refused, without reviewing them separately will appear. We have examined them, and conclude they were properly refused.

A motion was made for a new trial, based on rulings assigned as errors and which we have been considering. It was overruled and we find no occasion for disturbing the verdict and judgment.

Affirmed.

## ALABAMA G. S. R. CO. v. HALL.

(*Supreme Court of Alabama, June 5, 1902.*)

[32 So. Rep. 259.]

**Negligence—Driving Horse into Trestle—Sufficiency of Complaint.**

A complaint against a railroad company alleging that plaintiff claimed damages for that defendant negligently caused a horse of his to run into a trestle, whereby he was injured, is not demurrable as failing to aver or show that defendant owed plaintiff any duty, or as being too vague in its averment of negligence.

**Same—Same—Sufficiency of Evidence.\***

In an action against a railroad for injuries to a horse, there was evidence that defendant's train was moving towards a trestle; that the horse was running along the track towards the trestle, in apparent fright of the train; that the track was on an embankment 5 or 6 feet high; that the train was from 30 to 50 yards behind the horse, and gaining on him; that the engineer was aware of the situation, but did not seasonably stop or check the train; that, had he done so, the horse would not have continued his flight onto and into the trestle, and the injury would have been averted: *held* not error to refuse defendant's request for the general affirmative charge.

**Same—Same—Instruction.**

The court charged that, if it appeared that the animal was in such a state of fright that it would have fallen into the trestle anyway, plaintiff could not recover, "but, if that does not reasonably appear, then, when the animal got on the main line, if the engineer saw that it was headed towards the trestle, it became the duty of the engineer \* \* \* to stop the train, and if the engineer failed to do so, and this train ran on, and the horse ran into the trestle, the plaintiff is entitled to a verdict, if the jury should also believe \* \* \* that the failure \* \* \* contributed to running the horse into the trestle": *held* that, while the opening clause of the quoted portion tended to authorize a verdict for plaintiff upon the jury's not being reasonably satisfied that the horse would have gone into the trestle in any event, the last clause corrected the tendency.

\*See foot-note appended to *Central of Georgia Ry. Co. v. Dumas* (Ala.), 23 Am. & Eng. R. Cas., N. S., 956.

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**Same—Same—Duty of Engineer Seeing Frightened Horse Running into Danger.**

In an action against a railroad for injuries to a horse, owing to his having been driven into a trestle by one of defendant's trains, a charge asserting that when the horse got on the main line, and the engineer saw it was headed towards the trestle, it became his duty to stop the train, was justified where the evidence was undisputed that the horse was frightened and running from the train along a considerable embankment, which led onto the trestle.

Appeal from circuit court, De Kalb county; J. A. Bilbro, Judge.

Action by C. L. Hall against the Alabama Great Southern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff claimed damages, under separate counts, for injury to a horse and a mule, but the court gave the general affirmative charge for the defendant as to the damages claimed for the mule. The count of the complaint claiming damages for the horse, and the substance of the demurrers to said count, are set out in the opinion. The recital in the judgment entry relative to the rulings upon the demurrer to this count of the complaint, which was the amended complaint, was as follows: "The defendant demurs to amended complaint, and, on consideration of the court, the demurrer is overruled." On the trial of the cause it was shown that the train which frightened the horse of the plaintiff was a local freight train going north. The evidence for the plaintiff tended to show the following facts: The train had backed onto a switch to get a car. The horse in question was on the side track, and ran along the side ahead of the train for a short distance—about 75 yards—to the main line. That when the horse was on the north side track the train was going toward him, and was about 50 yards off. The horse then ran up the line to the trestle, ran on the trestle, and fell through it. The trestle was from 30 to 35 yards north of the point where the side track comes into the main line. The horse was frightened by the train, and ran along the track ahead of it until he fell into the trestle. The engineer did not blow the whistle or ring the bell of the engine. The engineer began checking the train before the engine got on the main line, but the engine and cars were moving when the horse fell in the trestle. When the train stopped, the engine was on the main line, and the tender and rest of the train were on the switch, and the engine was about 30 yards from the horse. The engine did not come in contact with the horse, and did not get nearer to him than about 30 yards. The engine was going faster than the horse, and was gaining on him. The fall of the horse was proven, and it was shown that he was worthless after the accident. The engineer on said train, as a witness in behalf of the defendant, testified that he saw the horse start down the side track towards the main line; that at that time the train was running at 5 to 6 miles an hour, and

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should have been stopped in from 15 to 30 feet; that the horse was about 200 feet in front of the engine, and the engine never got closer than 150 feet to him, and when he stopped the engine it had just gotten on the main line. It was shown that the main track was upon an embankment. The engineer testified that the embankment did not have precipitous sides, but was an ordinary embankment. A witness for the plaintiff testified that when the mule went down the embankment he partly slid down. The court, in its oral charge to the jury, instructed them as follows: "When the animals got on the main line, there are two matters for the jury to consider: First, were the animals in such a state of fright at that time that they would have fallen into the trestle anyway? If it reasonably appears that the animals would have continued in their flight and fallen into the trestle whether the train moved further or not, then the plaintiff cannot recover (but, if that does not reasonably appear, then, when the animals got on the main line, if the engineer saw that they were headed toward the trestle, it became the duty of the engineer, on perceiving the animals on the track, to take steps to stop the train; and if the engineer failed to do so, and this train ran on, and they ran into the trestle, the plaintiff is entitled to a verdict, if the jury should also believe from the evidence that the failure of the engineer to check his train contributed to running the horse into the trestle)." The defendant separately excepted to that portion of the charge copied above which is within the parentheses, and also separately excepted to the court's refusal to give the general affirmative charge requested by it. There were verdict and judgment for the plaintiff, assessing his damages at \$81.

Amos E. Goodhue, for appellant.

Davis & Haralson, for appellee.

McCLELLAN, C. J. Action by Hall against the railroad company. The complaint is as follows: "Plaintiff claims of the defendant the sum of seventy-five dollars as damages for that on or about the — day of August, 1900, defendant negligently caused one horse, the property of plaintiff, to run into a trestle on defendant's railroad, and thereby injured it so it was worthless." There was also a mule in the complaint and in the trestle; but as no injury to it was proved, and the court charged affirmatively for defendant as to the damages claimed as to it, we pretermitted the mule. There was a demurrer to the complaint on the grounds that it failed to aver or show that defendant owed the plaintiff any duty in respect of the animal, and that its averment of negligence was too vague and indefinite. The demurrer was overruled, and properly, under the authority of *Railway Co. v. Lazarus*, 88 Ala. 453, 6 South. 877; *Oxford Lake Line Co. v. Stedham*, 101 Ala. 376, 13 South. 553; and *Louisville & N. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620. We do not



decide whether there was a judgment entry as to this demurrer.

On the evidence before them, it was open to the jury to find that defendant's train was being moved forward toward a trestle; that plaintiff's horse was on the track between the engine and the trestle, running, in apparent fright of the train, toward the trestle; that the track along which the horse ran was on an embankment 5 or 6 feet high, the sides of which, while not precipitous, were yet at such an incline as that a horse, in attempting to go down them, would partially slide; that the train was from 30 to 50 yards behind the horse, and going faster than he was,—“gaining on him”; that the engineer was aware of the situation, but did not seasonably stop or check the speed of his train; that, had he done so, the horse would not have continued his flight onto and into the trestle, and the injury to the animal would have been averted.

In view of the phase of the case presented by these tendencies of the evidence, the court properly refused the affirmative charge requested by the defendant. Seeing the horse running directly toward the trestle, in fear of the advancing train,—the surroundings being such as that he would probably continue his flight along the track into the trestle if the train continued to advance,—the engineer owed the plaintiff the duty of stopping the train and thereby removing the cause of the flight of the animal; and if he negligently failed to discharge this duty, and in consequence the horse was injured, the defendant is liable.

Of course, it was a matter of inference for the jury whether the horse would or not have continued his flight into the trestle had the train been stopped when it should have been; and it was necessary, of course, for the jury to be reasonably satisfied that he ran into the trestle in consequence of the continued advance of the train, before they were authorized to return a verdict for the plaintiff. That part of the oral charge to which an exception was reserved, taken as a whole, and in connection with its context, is not an erroneous statement of law in this regard; for while, in its opening clause, it is open to a construction which might authorize a verdict for the plaintiff upon the jury's not being reasonably satisfied that the horse would have gone into the trestle in any event, when it was necessary for them to find that he would not have gone there but for defendant's negligence, yet the last clause corrects this faulty tendency by requiring the jury to find for plaintiff only in the event the failure to stop the train contributed to the injury.

Nor, in our opinion, was the oral charge bad, when referred to the evidence, for asserting that when the horse got on the main line, and the engineer saw that he was headed for the trestle, it became the duty of the engineer to take steps to stop his train. The evidence is undisputed that the horse was frightened by, and in flight from, the train, and that he



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was running on a considerable embankment,—his easiest route of flight, but for the trestle being on and along the track. On these facts, there was such obvious danger of the horse's running into the trestle from the time he got on and began to run along the main track as to impress the mind of an ordinarily prudent man in the place of the engineer with the necessity of removing the cause of the horse's fright and flight by stopping the pursuing engine, and it then became the engineer's duty to stop it.

We find no error in the record, and the judgment must be affirmed.

## MISSOURI PAC. RY. CO. v. COLUMBIA.

(*Supreme Court of Kansas, July 5, 1902.*)

[69 Pac. Rep. 338.]

**Negligence—Proximate and Remote Cause.**

In a case where two distinct, successive causes, wholly unrelated in operation, contribute toward the production of an accident resulting in injury and damage, one of such causes must be the proximate and the other the remote cause of the injury.

**Prior and Remote Cause.**

A prior and remote cause cannot be made the basis of an action for the recovery of damages if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and sufficient cause of the injury.

**Question for Court.**

In a case where it is either admitted, or from the facts as found established, that two distinct, successive causes, unrelated in their operation, conjoined to produce a given injury, the question of remote and proximate cause becomes one of law for the decision of the court, and not of fact for the determination of the jury, and the determination of this question of law by the jury is not binding or conclusive upon the court.

(Syllabus by the Court.)

In banc. Error from district court, Morris county; O. L. Moore, Judge.

Action by Jennie V. Columbia against the Missouri Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Waggener, Horton & Orr, for plaintiff in error.

Humphrey & Humphrey and John Maloy, for defendant in error.

POLLOCK, J. C. D. Columbia, a locomotive fireman in the employ of the Missouri Pacific Railway Company, was killed by the derailment of his engine at the station of Langley, on said road. His widow, Jennie V. Columbia, in her own behalf and in behalf of her minor children, brought this action to recover damages on account of negligence of the company resulting in his death. The acts of negligence

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charged are: First, that the company negligently permitted several heavy grain doors to be piled and remain upon a raised platform at the west end of its depot at the station of Langley, near the track upon which the engine which Columbia was firing was scheduled to pass on the night of May 9, 1899, and said heavy grain doors, being there so negligently placed, were blown off, falling upon the track, derailing the engine, causing the death; second, that it was the duty of the company to provide a reasonably safe and clear track over which said engine should run, and in disregard of its duty in this respect the company negligently permitted said heavy grain doors to remain upon the track after being blown there by the wind, thus obstructing the track, rendering it unsafe for use, the result of which negligence caused the death of Columbia. The general verdict was for the plaintiff. In addition to the general verdict, at the request of defendant, the jury made special findings of fact from the evidence, as follows: "Q. 1. How long had C. D. Columbia, deceased, been in the employ of the defendant company prior to May 9, 1899? A. About seven (7) years. Q. 2. In what capacity had the said C. D. Columbia been employed by the defendant prior to May 9, 1899? A. Two years in round house and five years fireman on locomotive. Q. 3. In his capacity as fireman on locomotive engine, did his duty require him to pass and re-pass said station where said doors were piled many times, day and night, prior to the evening of May 9, 1899? A. Yes. Q. 4. If question No. 3 is answered in the affirmative, then state how frequently the said C. D. Columbia had passed said depot previous to the date of the said accident. A. According to evidence, about six hundred (600) times in the five years. Q. 5. For what length of time previous to the date of the said accident had said doors been piled on said depot platform? A. Since the road has been in operation. Q. 6. Were the same piled in a conspicuous place on the platform, where they could easily be seen by the said C. D. Columbia and other employees passing to and fro over the track? A. Yes. Q. 7. Was it the usual and ordinary practice of the defendant company to pile grain doors upon the platform of their various stations in the manner in which the grain doors were piled at the station of Langley on the evening of May 9, 1899, and prior thereto? A. No. Q. 8. If you answer question number 7 'No,' or in the negative, then state what was the practice of defendant with reference to piling of grain doors along its line of road at other stations. A. At stations where there were elevators, near the elevator, and at the depot where there is no elevator. Q. 9. How many grain doors were piled on the depot platforms at Langley on the evening of May 9, 1899? A. From 11 to 15. Q. 10. What were the dimensions and weight of said grain doors so piled on said platform of the depot at Langley on the evening of May 9, 1899? A. About 5½ to 6½ feet; weight from 70 to

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100 pounds. Q. 11. How far from the track on which deceased was injured were the said grain doors piled on the platform of said station? A. From 15 to 22 feet. Q. 12. For how many years prior to May 9, 1899, had it been the custom to pile the grain doors on the depot platform at Langley, Kansas? A. From 10 to 14 years. Q. 13. If you find that it had been the custom or practice of said defendant company to pile the grain doors on the depot platform at Langley, Kansas, then state if there had ever before been an accident similar to the one which resulted in the injury complained of, or any other accident, by reason of the piling of grain doors on said depot platform? A. No. Q. 14. If question No. 13 is answered in the affirmative, then state when, where, and under what circumstances such other accident occurred? A. \* \* \* Q. 15. During the time that you find it has been the custom or practice of the defendant company to cause its grain doors to be piled on the depot platform at Langley, Kansas, had any accident ever resulted on account of said grain doors being so piled? A. No. Q. 16. Were one or more of said grain doors carried, by an unusual and extraordinary windstorm or severe gale, from the place where they were piled onto defendant's track? A. By severe gale. Q. 17. If question No. 16 is answered 'No,' then state what caused the said door or doors to be thrown onto defendant's track. A. \* \* \* Q. 20. Was said windstorm of such a character as to blow off a bracket on said depot? A. No. Q. 21. If you answer question No. 20 'No,' or in the negative, then state what damage, if any, was done to said depot by reason of said windstorm. A. Two battens ripped off and two brackets damaged. \* \* \* Q. 24. At the time said doors were blown onto said track, was there any agent or employee of the defendant company on duty in or about the said depot building? A. No. Q. 25. Did any employee of the defendant company have any notice or knowledge that said grain doors, or any thereof, had been blown onto the track previous to the injury complained of. A. No. Q. 26. If question No. 25 is answered 'Yes,' then state the name of such employee, and in what capacity he was employed. A. \* \* \* Q. 27. How long did the said grain doors which was blown onto the track remain on the track before the accident occurred? A. No evidence to show. Q. 28. If there had been no windstorm or severe gale on the evening of May 9, 1899, would the accident complained of have occurred? A. We believe not. Q. 29. Was the windstorm or severe gale which carried the door from the pile on the platform to the track, where the accident occurred, the proximate cause of the accident? A. No. Q. 30. If you answer the next preceding question 'No,' or in the negative, then state what was the proximate cause of the accident. A. By piling grain doors on elevated platform in an exposed position." Defendant filed its motions for judgment in its favor upon

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these findings, notwithstanding the general verdict, and for a new trial, which motions were overruled, and judgment entered upon the verdict in favor of plaintiff. Defendant brings error.

The single question for our consideration is, was defendant entitled to judgment upon the special findings made by the jury, notwithstanding the general verdict? It is obvious that under the findings made the second claim of negligence pleaded is eliminated from the controversy, for, the burden of proof resting upon the plaintiff to prove the acts of negligence charged, and there being, as found by the jury, "no evidence to show" how long the grain doors remained upon the track before the engine arrived at the place of derailment, negligence in permitting an obstruction to remain upon the track was not proven. As to the remaining act of negligence charged, upon the findings made, a much more grave and serious controversy arises. From the findings it is learned that the deceased had been employed by the company as locomotive fireman on its line of railway for five years. During these five years he had passed the station of Langley about 600 times. It was the custom of the company at stations where no elevator was located to pile the grain doors at the depot. There was no elevator at Langley. The company had piled the grain doors upon the depot platform at this station since the construction and operation of the road, a period of some 10 to 14 years. There were on the night of the injury from 11 to 15 of these doors, in size about 5½ by 6½ feet in dimensions, in weight from 70 to 100 pounds, piled in the usual place and manner, about 15 to 22 feet from the track. During all the years in which the road had been operated these grain doors had been so piled, and no accident had resulted therefrom. On the night in question a severe gale blew one or more of these doors from the place where located upon the track, resulting in such obstruction of the track as to derail the engine, causing the death of deceased. Had the severe gale not blown, the injury complained of would not have happened. The findings so made up to this point are without doubt clearly in favor of defendant, but in respect to questions numbered 29 and 30 the jury find the piling of these grain doors in an exposed position upon the elevated platform was, and the severe gale which blew at that time was not, the proximate cause of the derailment of the engine. Upon these findings the learned counsel for plaintiff in error make two contentions: First. From the findings made, the deceased must have known of the practice of piling these grain doors at this station, and, knowing this fact, by continuing in the employ of the company without protest, he assumed the risk incident thereto, if any might have been foreseen. Second. The place and manner of keeping the grain doors, taken in connection with all the findings in the case as made by the jury, does not constitute actionable neg-

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ligence against the company; and, the jury having found that two distinct, successive causes, independent in their operation, contributed toward the injury complained of by plaintiff, it became a matter of law for the court to declare which of the two distinct, successive, independent causes was the direct and proximate cause of the injury; that this question of law was not settled and concluded by the findings of the jury as to the proximate cause of the injury. With the first proposition we cannot agree. It is not shown deceased had any actual knowledge of the place and manner in which the doors were piled. Neither is it shown it was any part of the duty of a locomotive fireman to observe or know the manner of piling grain doors at the stations along the line of road, and there is nothing in the nature or character of his duties which would necessarily attract his attention to such objects. He was not, therefore, required to know such fact. Again, assuming for the purpose of the argument that the deceased actually knew of the location of these doors at the station of Langley, or that from the frequency with which he had passed this station in the five years of his service as fireman, with these doors placed in plain and unobstructed view, he must have known of their location and existence, and then the argument must fail, because it is not shown deceased knew or should have known that the manner or place of piling the doors portended danger to him, and he had the right to assume that the company, in the exercise of a superior knowledge in the performance of its duty to furnish a clear and reasonably safe track over which to run the engine, would not place these doors in such position as to expose him to unnecessary danger. *Railway Co. v. Williams*, 172 Ill. 379, 50 N. E. 116, 64 Am. St. Rep. 44; *Dickson v. Railway Co.*, 124 Mo. 140, 27 S. W. 476, 25 L. R. A. 320, 46 Am. St. Rep. 429; *Faren v. Sellers*, 39 La. Ann. 1011, 3 South. 363, 4 Am. St. Rep. 256; *Railway Co. v. Leverett*, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230; *Railroad Co. v. Irwin*, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266; *Railroad Co. v. Rowan*, 55 Kan. 270, 39 Pac. 1010.

The remaining proposition is one more difficult of solution. The existence or nonexistence of negligence in any given case, wherein the facts are disputed is a question of fact to be determined by the jury. When the facts are undisputed, and only one inference or deduction is to be drawn from them, a question of law is presented for the court. *Dewald v. Railroad Co.*, 44 Kan. 586, 24 Pac. 1101. However, it is not every act of negligence that furnishes a basis for recovery of damages sustained. In the case of *Cleghorn v. Thompson*, 63 Kan. —, 64 Pac. 605, this court held: "Negligence, to be actionable, must result in damage to some one, which result, in the absence of wantonness or *malum animo*, might have been reasonably foreseen by a man of ordinary intelligence and prudence, and be the probable result of the initial act. The



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allegation of negligence is not sustained by evidence of acts resulting in damage to another, which result is not the reasonable and ordinary outcome of such acts, and which would not have been foreseen under all the circumstances of the case." In the opinion, quoting from *City of Allegheny v. Zimmerman*, 95 Pa. 287, it is said: "One is answerable in damages for the consequences of his faults only so far as they are natural and proximate, and may, therefore, have been foreseen by ordinary forecast, and not for those arising from a conjunction of his own faults with circumstances of an extraordinary nature." "Negligence is not the proximate cause of an accident, unless, under the circumstances, the accident was a probable as well as a natural consequence thereof,—one which might reasonably have been foreseen by a man of ordinary intelligence and prudence." *Huber v. Railroad Co.*, 92 Wis. 636, 66 N. W. 708, 31 L. R. A. 583, 53 Am. St. Rep. 940. "It is not enough that the defendant has been negligent, unless that negligence has contributed to the injury of the plaintiff." *Sowles v. Moore*, 65 Vt. 322, 26 Atl. 629, 21 L. R. A. 723. While one is responsible for such consequences of his fault as are natural and probable, and might, therefore, be foreseen by ordinary forecast, if his fault happened to concur with something extraordinary, and therefore not likely to be foreseen, he will not be answerable for the extraordinary result. *Schaffer v. Jackson Tp.*, 150 Pa. 145, 24 Atl. 629, 18 L. R. A. 100, 30 Am. St. Rep. 792; *Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Hubbell v. City of Yonkers*, 104 N. Y. 434, 10 N. E. 858, 58 Am. Rep. 522; *Washington v. Railroad Co.*, 17 W. Va. 190; *Block v. Railroad Co.*, 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849; *Canal Co. v. Westlake*, 23 Colo. 26, 46 Pac. 134; *Lewis v. Railway Co.*, 54 Mich. 55, 19 N. W. 744, 52 Am. Rep. 790; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Henry v. Railway Co.*, 76 Mo. 288, 43 Am. Rep. 762. In cases of this character, where two distinct, successive causes, unrelated in operation, to some extent contribute to an injury, it is settled, where there is an intervening and direct cause, a prior and remote cause cannot be made the basis for recovery of damages, if such prior cause did no more than furnish the condition or give rise to the occasion by which the injury was made possible. And it seems to be sound in principle and well settled by authority, where it is admitted or found that two distinct, successive causes, unrelated in the operation, conjoin to produce a given injury, one of them must be the proximate and the other the remote cause of the injury, and the court, in passing upon the facts as found or admitted to exist, must regard the proximate as the efficient and consequent cause, and disregard the remote cause. In *Railway Co. v. Trich*, 117 Pa. 390, 11 Atl. 627, 2 Am. St. Rep. 672, it is held: "When, in an action for negligence, the fact is undisputed in the evidence that the injury received was inflicted by an



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intervening agency over which the defendant had no control, the question of remote or proximate cause must be determined by the court, and the jury instructed accordingly." In *Herr v. City of Lebanon*, 149 Pa. 222, 24 Atl. 207, 16 L. R. A. 106, 34 Am. St. Rep. 603, it is held: "If two distinct causes are successive and unrelated in their operation, one of them must be the proximate and the other the remote cause. In such case the court regards the proximate as the efficient and consequent cause, and disregards the remote." In *Goodlander Mill Co. v. Standard Oil Co.*, 11 C. C. A. 253, 64 Fed. 400, 27 L. R. A. 583, it is said: "The proximate cause of an injury is that cause which, in the natural and continuous sequence, unbroken by an efficient, intervening cause, produces the injury, and without which the result would not have occurred." *Bleil v. Railway Co.*, 98 Mich. 228, 57 N. W. 117; *Insurance Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395. Apply these principles to the case at bar, and what conclusion must be reached therefrom? We find the grain doors in question piled 15 to 22 feet from the track. They weighed 70 to 100 pounds each. They were 5½ by 6½ feet in dimension. With batten nailed across ends, they were 2 inches in thickness. There were 11 to 15 of them, thus making a pile of the height of 22 to 30 inches. They were piled against the depot building. In this place and manner the same kind of doors had been placed from 10 to 14 years prior to the injury, and no accident transpired therefrom. That the placing of these doors in the position in which they were placed furnished the occasion or condition which rendered the accident possible is not to be disputed, and cannot be denied. That is to say, if these grain doors had not been there on the depot platform, the accident which did happen would not have happened; the injury would not have occurred. But can it be reasonably and successfully maintained that the employees of the company, in the exercise of that reasonable care and precaution required for the safety of those operating the engines of the company to keep the track free of obstructions, should have foreseen, anticipated, or even imagined that from the operation of any ordinary, natural cause these doors, or one or more of them, might be lifted and carried from the place where located, and lodged upon the track in such manner as to obstruct and render dangerous the operation of the road, or as to cause the derailment of an engine? We think not. On the night in question a severe gale blew. A gale is defined as a wind having a velocity of 40 to 70 miles an hour. *Stand. Dict.* Webster defines a heavy gale as a wind having a velocity of 80 miles an hour. The jury find, and must of necessity have found, under the evidence, the accident would not have occurred in the absence of this severe gale. In *Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, Mr. Justice Strong, in delivering the opinion of the court, says: "But it is generally held that, in order to warrant a finding that negligence, or an

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act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. \* \* \* We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is an efficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate, efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury." The trial court instructed the jury as follows: "The jury is instructed that by the proximate cause of an injury is meant that cause which, in the natural and continuous sequence, unbroken by any intervening cause, produces the injury, and without which the result would not have occurred. The jury is instructed that negligence is not the proximate cause of an accident unless under all the circumstances the accident might have been reasonably foreseen by a man exercising reasonable and ordinary care. It is not enough to prove that the accident is the natural consequence of some negligence. It must also have been the probable consequence of the special act of negligence alleged in plaintiff's petition; and before you can find a verdict for the plaintiff herein you must find from the evidence the piling of the said grain doors upon the platform of defendant company at Langley, Kansas, was negligence, and that the defendant company, in the exercise of reasonable and ordinary care, should have foreseen that the piling of said grain doors upon the platform at Langley, Kansas, would in all probability cause an injury similar to that which did happen on the evening of May 9, 1899, and which resulted in the death of C. D. Columbia. You are instructed that that which never happened before, and which in its character is such as not to naturally occur to prudent men, to guard against its happening at all, cannot, when in the course of years it does happen, furnish good ground for a charge of negligence in not foreseeing its possible happening and guarding against the remote contingency." Measured by authority, determined upon principle, or viewed in the light of the instructions of the court to the jury, which of the two distinct, successive causes operating independently of each other to produce the injury,—that is, the place and manner of piling and keeping the grain doors, or the severe gale,—must be held to have been the consequent, efficient, and proximate cause of this injury? Manifestly, it must be said the place and manner of piling and keeping the doors did no more than furnish the condition, afford the oppor-

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tunity, for the accident which occurred. The operation of the successive, wholly independent and unrelated cause and intervening agency, the severe gale, was the consequent, efficient and proximate cause of the grain doors being upon the track, which resulted in the derailment of the engine and damage to plaintiff.

It follows, under the charge of the court to the jury, and the findings of fact as made by the jury, the general verdict should have been in favor of the defendant. The jury failing in this, the trial court should have sustained the motion for judgment upon the findings made, notwithstanding the general verdict. Judgment must therefore be reversed, and cause remanded, with instructions to enter judgment upon the findings in favor of defendant. All the justices concurring.

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CHICAGO, R. I. & P. R. Co. v. McDOWELL.

(*Supreme Court of Nebraska, Oct. 22, 1902.*)

[92 N. W. Rep. 121.]

**Personal Injuries—Future Damages.**

In an action for personal injuries, compensation can be recovered for only such future damages as are shown with reasonable certainty to be consequent thereupon.

(Syllabus by the Court.)

Commissioners' opinion. Department No. 3. Error to district court, Jefferson county; Letton, Judge.

Action by Jay B. McDowell against the Chicago, Rock Island & Pacific Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

M. A. Low, W. F. Evans, L. W. Billingsley, R. J. Greene, and R. H. Hagelin, for plaintiff in error.

John Heasty, for defendant in error.

AMES, C. This is an action to recover damages alleged to have been suffered by the defendant in error from injuries inflicted upon him while a passenger upon one of the trains of the plaintiff in error. The evidence that such injuries were of a serious or permanent character is very slight, but is, perhaps, sufficient to sustain a verdict for the plaintiff, under the familiar rule of this court with reference to such matters. From a verdict and judgment of \$2,000 in favor of the plaintiff below, the company prosecutes error in this court.

The sole question presented here is as to the correctness of the following instructions given by the court at the request of the plaintiff: "If you find that plaintiff is entitled to recover, your verdict should be in such amount as will compensate him for the injuries which he has sustained. The temporary injuries, if any, which plaintiff sustained in the wreck in question, are elements of damage, and should be considered by

you in coming to a verdict, and plaintiff should be fully compensated for such injuries. And if you believe that plaintiff suffered continuing or permanent injuries as a result of said wreck, it is your duty to estimate, as well as it can be done, the damages which he has suffered since the time of the injury by reason thereof, as well as what he may hereafter suffer, if any, and include such damages in your verdict. It is your duty to take into consideration the nature of all injuries, if any, the extent of them, and the pain and suffering which plaintiff has endured. You should also take into consideration the length of time that has elapsed from the time that plaintiff received his injuries until the present, not as interest, but simply as a part of the compensation to which the plaintiff would be entitled to make him whole, if you find he is entitled to recover (modified thus): If you find plaintiff suffered injuries continuing from the time of the accident until now." The particular part of this instruction which is complained of as erroneous is the third sentence thereof, as follows: "And if you believe that plaintiff suffered continuing or permanent injuries as a result of said wreck, it is your duty to estimate, as well as it can be done, the damages which he has suffered since the time of the injury by reason thereof, as well as what he may hereafter suffer, if any, and include such damages in your verdict." In support of its contention, the plaintiff in error cites a large number of authorities, including *Railway Co. v. Archer*, 46 Neb. 907, 65 N. W. 1043, to the effect that in such actions only such future damages may be compensated as are reasonably certain to result from the injury complained of; and it is insisted that the instruction in question is vicious, for the reason that it tells the jury that they may allow to the plaintiff compensation for such damages as he "may hereafter suffer," thus departing from the rule of reasonable certainty, and opening the door for unrestrained speculation. The defendant in error does not dispute the validity of the general rule relied upon by his adversary, but insists that it was not violated by the trial court, because the instruction limits the right of recovery to such damages as may result from permanent injuries. It is argued by counsel that by this means the element of uncertainty is removed or excluded, since, if the injuries are of a permanent character, continuing and future damages must necessarily result therefrom. To this extent the rejoinder is good, but we do not think it is a complete answer to the criticism of the plaintiff. It is true that, by the hypothesis, some future damages may be presumed to flow from the permanent and continuing injuries; but whether they may be very great or merely trivial in amount cannot be foretold, and for such only as are reasonably certain can a recovery be had under the rule invoked. It is reasonably certain that, to a person in the common walks of life,—especially to a farmer or mechanic,—the loss of the right hand would

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be a constant source of annoyance, and an impairment of efficiency in his calling which would be the occasion of the daily diminution of his wages or earnings; but it may not exclude him from some future and as yet unanticipated calling or employment, which, if engaged in, would lead on to fortune, and it may also, by discouraging him from the pursuit of his present vocation, be the indirect means of his attaining to wealth and prominence. Hence, as it seems to us, the mere fact that the injuries are permanent does not remove the element of uncertainty as to the amount of damages which they may cause, nor relieve the court from the duty to instruct the jury that only such as are reasonably certain to result therefrom can be compensated by their verdict. This view as to the application of the rule under discussion has the support of *Fry v. Railway Co.*, 45 Iowa, 416, and of *Bigelow v. Railway Co.*, 48 Mo. App. 367. We think that, in order to satisfy the rule under discussion, it must appear with reasonable certainty that disabilities have resulted from the injury complained of, and that reasonably certain future damages will result therefrom. The greater or less degree of permanency of the injury affects the question of the continuing nature of the damages, but does not determine their amount, which must also be ascertained with reasonable certainty.

We recommend that the judgment of the district court be reversed, and a new trial granted.

ALBERT and DUFFIE, CC., concur.

PER CURIAM. For reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed, and a new trial granted.

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CARTER v. CHARLESTON & W. C. RY. CO.

(*Supreme Court of South Carolina, June 25, 1902.*)

[42 S. E. Rep. 161.]

Injury to Person Going on Train to Purchase from Fruit Vender—  
Jumping from Moving Train—Failure to Give Signals—Duty to  
Trespassers.\*

There was evidence that plaintiff went on a passenger train standing at a crossing for the purpose of buying oranges from the fruit vender thereon, and after the train started he jumped from it and broke his leg: *held*, that allegations in the complaint that defendant failed to give the statutory signals before starting the train were properly stricken out, as defendant owed plaintiff no such duty.

Evidence.

In an action by a trespasser for injuries received in jumping from a moving train, evidence as to whether the accident would have happened if the train had remained standing at the station the usual time is inadmissible.

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\*See foot-note appended to *Crawleigh v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.), 2 R. R. R. 630, 25 Am. & Eng. R. Cas., N. S., 630.

Carter v. Charleston & W. C. Ry. Co

Appeal from common pleas circuit court of Barnwell county; Benet, Judge.

Action by Daniel Carter against the Charleston & Western Carolina Railway Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

R. A. Ellis and Davis & Best, for appellant.

Laura T. Izlar, for appellee.

POPE, J. Plaintiff sues to recover \$5,000 damages received by him, caused by the alleged negligence of the defendant. His complaint alleges two causes of action—one for injuries received through the negligence of defendant in starting its train while standing across a highway at Martins, S. C., without giving the statutory signals, viz., by sounding its whistle or ringing its bell; the second cause of action was the alleged negligence of defendant in starting its train suddenly, so that plaintiff was prevented from alighting from the train in safety, having his left leg fractured above the knee in reaching the ground in alighting from said train. Inasmuch as plaintiff was not a passenger on said defendant's train, nor expecting any one in whom he was interested to arrive or depart on or from the defendant's passenger train, nor was he waiting to cross said highway, but was merely at the railroad crossing expecting to buy some oranges from the newsboy and fruit agent on said train, the circuit judge held that the defendant railway company owed the plaintiff no duty compelling it to ring its bell or sound its whistle before its train should start from its standstill across the highway; and as he was not a passenger or expecting to become a passenger on said train, and, further, as he was not expecting any one to disembark from said train or embark on said train, his cause of action relating to the statutory signals demanded by law of railroads in order to avoid collisions at or on a railroad crossing of a highway, plaintiff's first cause of action, must be eliminated from the complaint. Plaintiff then proceeded to offer testimony as to the want of ordinary care of the defendant in its treatment of the plaintiff. The testimony offered by plaintiff tended to show that plaintiff entered defendant's train to purchase a couple of oranges from the fruit vender on the train; that he had purchased the oranges, but before he alighted from the train it was started, and it was not until the train had gone 75 yards that the plaintiff jumped off, breaking his leg. It was not in testimony that the fruit agent had any connection with the defendant; that the defendant owed any duty to the plaintiff; that the defendant did any act or uttered any word by which the plaintiff was induced to go on its train or jumped off of the same. Under these circumstances, the circuit judge granted defendant's motion for a nonsuit as soon as plaintiff completed his testimony. After entry of judgment thereon, the plaintiff appealed upon the following grounds: "(1) Because his Honor struck out of the first cause of action



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of the complaint the following material allegations: So much of paragraph 5 as alleges that defendant moved its train, 'having in violation of law failed to give the signals required by law before starting said train,'—and also because he struck out the whole of paragraph 7 and so much of paragraph 8 as alleged that said train did not stop as long as required by law; whereas he should have retained said portions of the complaint as a part thereof for the trial of this cause. (2) Because his Honor ruled that the complaint stated that plaintiff 'entered' the car to buy oranges, whereas he should have held that complaint only stated that plaintiff got on platform for purpose stated. (3) Because his Honor ruled that, because plaintiff was not a passenger, he could not, 'therefore, claim any benefit allowed by the statute which requires the blowing of whistles or ringing of bells when approaching a crossing, or the requirements of the statute which say that signals shall be given when the train is at a standstill within a hundred rods of a crossing'; but should have held that the public generally, the plaintiff included, were entitled to the benefits and protection of said statutes. (4) Because his Honor, the presiding judge, ruled that all allegations of the complaint which stated that said train did not stop long enough for passengers to get off and on, as the statute requires, must be stricken out on the ground that plaintiff was not a passenger; whereas he should have held that the public have the right to expect that railway companies will obey the law referred to above and to claim the benefit of that law, in so far as obedience to said law would have inured to plaintiff's safety or disobedience thereto would have resulted in his damage and injury. (5) Because his Honor, the presiding judge, ruled, in the order of nonsuit herein, that there was no evidence to go to the jury; whereas he should have held that notwithstanding that his Honor excluded all testimony going to show the failure of the defendant company's agents and servants to give the statutory signals, and excluded all testimony going to show that defendant failed to stop its train on that occasion the length of time required under section 1687 of the Revised Statutes of 1893, yet there was evidence in the testimony of the plaintiff, Daniel Carter, to go to the jury, where he testified as a cause of his injury that defendant company did not stop its train any length of time,—meaning the length of time it should have stopped,—and his Honor, the presiding judge, under the testimony, should have refused the nonsuit, and allowed the case to go to the jury. (6) Plaintiff excepts to his Honor, the presiding judge's, ruling against the admissibility of the following question: 'On account of your accident and your forced inattention to your business, how did your farming interests suffer?' whereas he should have held that said question was admissible. (7) Plaintiff excepts to his Honor, the presiding judge's, ruling that the following question was inadmissible: 'Will you state, if the train had stopped as

long as it usually did, whether you would have been hurt?' whereas his Honor should have ruled the same legally admissible. (8) Plaintiff excepts to that portion of his Honor's remarks, in granting motion for nonsuit, in which he rules that 'less than a minute might be sufficient time to receive and let off passengers at a particular station;' whereas he should have held that the sufficiency of the time necessary to receive and let off passengers, according to the requirements of section 1687 of the Revised Statutes of 1893, was a question for the jury, and should have been submitted to them under the testimony on that point."

As to the first exception, we will say that the object of pleadings is that issuable facts should alone be stated. If, at any time before trial, a motion is made to relieve pleadings of redundant or unnecessary allegations of fact, the trial judge, if convinced that such objectionable facts are stated either in the complaint or answer, should order the same removed. In the case at bar it was admitted that the plaintiff was not at or near the railroad crossing with the purpose of crossing from one side of the railroad to the other side, and, further, that he was not proposing to become a passenger on said railroad train; hence any allegations as to the statutory signals by ringing the bell or sounding the whistle, and also any time that such railroad train should remain at the station, were not and could not be made issuable facts. This being so, the circuit judge was guilty of no error in his ruling as complained of in the first exception, and it is therefore overruled. The second exception, referring, as it does, to a slight mistake by the circuit court in referring to the fact that the plaintiff entered the car to buy oranges, whereas plaintiff only got on the platform of the car, cannot be sustained. If error at all, it was a mistake in favor of plaintiff, and is overruled. The third exception. We have already held that statutory signals were intended to protect the public from collisions at railroad crossings, and have no reference to bystanders who are not affected injuriously by the failure to give such signals. This exception is overruled. The fourth exception. We have already held that any statutory requirement as to the length of a stop at a station referred to railroads and their customs. Overruled. Exception 5. We have already passed upon the matters herein referred to. There was not even an effort made to connect the plaintiff and defendant in a matter of business. Besides, the plaintiff, without any request or order therefor from the defendant, jumped from the train. This exception is overruled. Exception 6. What matter of concern could any answer to the question propounded as set out in this exception have to the case in hand? If the defendant owed the plaintiff no duty except ordinary care, and without any action on defendant's part the plaintiff jumped from the train of his own motion, the testimony was properly ruled out. Exception 7. The

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question propounded as set out in this exception could not have brought out any answer which was proper in this case. It was properly overruled. Exception 8. Section 1687 of the Revised Statutes of the year 1893, which is in these words: "Every railroad company in this state shall cause all its trains of cars for passengers to entirely stop upon each arrival at a station advertised by such company as a station for receiving passengers upon such trains for a time sufficient to receive and let off passengers." The plaintiff admits he was not a passenger, and did not contemplate becoming one. This statutory regulation was for the benefit of passengers. The general public had no concern with such stops by railroads at their stations unless as passengers or contemplating becoming such. There was no mistake made by the circuit judge in this matter. The exception is overruled.

It is the judgment of this court that the judgment of the circuit court be, and is hereby, affirmed.

## CHICAGO &amp; A. R. Co. v. KUCKKUCK.

(*Supreme Court of Illinois, June 19, 1902.*)

[64 N. E. Rep. 358.]

**Personal Injuries—Vicious Dog—Opinion Evidence.**

In an action for injuries received from vicious dogs, it was not error to exclude evidence calling for the conclusions of the witness as to the character of the dogs, and as to whether in his opinion he had any reason to suppose the dogs were of a ferocious nature.

**Same—Same—Right to Be in Railway Office.\***

Plaintiff was attacked by dogs kept on the premises used by defendant as a railroad office. The premises were open, and there was nothing to inform the public that they had no right to go there. Defendant proved the situation and uses of the property, and it was not claimed that plaintiff knew dogs were kept on the premises: *held* not error to refuse to permit defendant's yardmaster to testify as to the rights of the public to go on the premises, resulting from their situation and use.

**Instructions.**

The omission of any material fact or requirement from a mandatory instruction purporting to state the rights of the parties and the facts authorizing a recovery cannot be cured by other instructions.

**Contributory Negligence—Instruction.**

An instruction in an action for injuries received from dogs, authorizing a recovery for plaintiff on the finding of certain facts, was not erroneous in omitting the requirement that plaintiff was not guilty of contributory negligence, where there was no evidence that plaintiff was guilty of such negligence.

**Appeal from appellate court, Second district.**

Action by Fred Kuckkuck, a minor, suing by his next friend, against the Chicago & Alton Railroad Company. From a

\*Liability for injuries to persons who are neither passengers nor railway employees, resulting from unsafe station and depot premises, see *Cincinnati, H. & D. R. Co. v. Aller* (Ohio), 21 Am. & Eng. R. Cas., N. S., 304, and extensive note, 309.

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judgment of the appellate court (98 Ill. App. 252) affirming a judgment in favor of the plaintiff, the defendant appeals. Affirmed.

James R. Flanders, for appellant.

Donahoe & McNaughton, for appellee.

CARTWRIGHT, J. Appellee, a minor, suing by his next friend, brought this suit in the circuit court of Will county against appellant to recover damages received from being attacked and bitten by two dogs kept by appellant on its premises. Upon a trial he obtained a verdict, on which judgment was entered, and the appellate court for the Second district affirmed the judgment. The yard office of the defendant in the city of Joliet stood on sloping ground facing east, and was even with the surface in front, while the back part rested on piers, leaving an open space under the building. Plaintiff went to the office with a telegraph operator, who was seeking employment, to show him the way. The telegraph operator went upstairs to the telegraph office, and plaintiff sat down on a bench in front of the building. It was in July, and after remaining there a short time he went around on the north side of the building to get in the shade, as he testified, and squatted or sat down upon his heels against one of the piers. There were two bull dogs on the premises. One of them was running loose, and the other was tied under the office by a chain from his collar, with a ring at the other end running on a telegraph wire. One end of the wire was fastened at the center pier, where the doghouse was, and the other end to a telegraph pole about 50 feet away, so that the dog could run back and forth and the ring would slide on the wire. Employees were accustomed to leave their dinner pails, rain coats, and other clothing there, and the dog was kept there by the authority of C. H. Haskell, the yardmaster and freight agent of defendant, to prevent pilfering and nuisances and to keep tramps away. The dogs were owned by James Corcoran, a yard clerk under Haskell, and had been kept there in that way about four months. Soon after plaintiff went around by the pier, he was attacked by the dogs, his clothes were torn from him, and he was badly bitten. He was rescued by the yardmaster and other employees of defendant, and his wounds were numerous and serious.

The first alleged error is the refusal of the court to admit testimony offered on the part of defendant to show that the dogs were not vicious or accustomed to attack persons. There was evidence on the part of the plaintiff tending to prove that the dogs were vicious and dangerous, and that the servants of defendant knew that fact. Defendant was allowed to prove by the yardmaster that he had observed people around near the dogs, and never had any knowledge or notice that they, or either of them, were of a ferocious nature or accustomed to attack or bite mankind. Another witness for

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defendant, who had kept and fed the dogs, testified that she never saw them attempt to bite or attack any stranger, and, if spoken sharply to by any person, they paid no attention to it. The owner of the dogs testified that prior to the time plaintiff was bitten he never had any notice or knowledge that the dogs, or either of them, were accustomed to attack or bite mankind. Defendant was allowed to offer testimony of the habits of the dogs, and that they never manifested a vicious disposition, and most of the questions to which objections were sustained called for mere conclusions of the witnesses as to the character of the dogs, and as to whether, in the opinion of the witness, he had any reason to suppose the dogs were of a ferocious nature. We find no error in the rulings.

It is further urged that the court erred in not allowing the yardmaster, Haskell, to testify whether the public had any right on the property where plaintiff was. Defendant proved the situation and uses of the property fully. The premises were open, and there was nothing to inform or indicate to the public that they had no right to go there. There was no sign that dogs were kept there, and there is no claim that plaintiff knew that dogs were there, or what sort of dogs they were. It was not error to refuse to admit Haskell's opinion as to the rights of the public resulting from the situation and uses of the property.

It is insisted that the court erred in giving to the jury, at the instance of the plaintiff, the following instruction: "In law, it is not necessary that the defendant should be proven to be the owner of the dog or dogs in question. If the jury believe, from the evidence, that said dogs were vicious, and accustomed to bite mankind, and that the defendant knowingly harbored them upon its premises, knowing them to be of a vicious nature, and used to attack and bite mankind, and if the jury further believe, from the evidence, that said dogs did lacerate and bite the plaintiff's legs and arms, as set forth in his declaration herein, then they should find a verdict in the plaintiff's favor." The objection made to the instruction is that it does not contain the requirement that plaintiff was in the exercise of ordinary care and caution for his own protection. At the request of the defendant, that requirement was placed before the jury in several instructions, and they were told that plaintiff must show that he was free from all negligence that contributed materially to the injury, that he must prove he was not guilty of any material negligence or carelessness that contributed to his injury, and that if he so conducted himself that he drew upon himself the attack of the dogs, and was thereby injured, he could not recover. The instruction objected to, however, was mandatory, and purported to state the rights of the parties and the facts which would authorize a recovery. Such an instruction must be complete in its statement of the facts which will justify a verdict, and, if any



material fact or requirement is omitted, the instruction will be erroneous. An instruction of that kind is not cured by others, because, if the jury obey the instruction, they will render a verdict upon the finding of facts stated in it, regardless of the omitted fact or requirement. *Railroad Co. v. Harwood*, 80 Ill. 88; *Mill Co. v. Morrissey*, 111 Ill. 646. If it was necessary for the plaintiff to prove that he was in the exercise of ordinary care, in order to establish a liability against the defendant, that fact should have been included in the instruction which directed the jury to find a verdict in his favor. As a matter of fact there was no evidence fairly tending to show any negligence on his part. He did not know that the dogs were under the building, or that they were dangerous, and the jury could not have found him guilty of any negligence. In *Keightlinger v. Egan*, 65 Ill. 235, it was held error to refuse an instruction that, if the dog was irritated and aggravated to bite the plaintiff by being kicked by him, and not from being a dangerous and savage animal naturally, they should find for the defendant, and that the plaintiff could not recover for an injury received as a result of his own carelessness and negligence. Judge Cooley says that the doctrine of contributory negligence applies to the case of injury by animals; and if a man heedlessly places himself on the premises of another, in the way of a bull which he knows to be vicious and dangerous, he has no lawful ground of complaint if he is gored. Cooley, *Torts*, 346. It is the rule, however, that the public are entitled to act upon the presumption that all dangerous animals are properly confined, and they need not exercise any especial care or caution for their protection. 1 *Thomp. Neg.* 934. In the case of domestic animals, which are not usually or naturally dangerous or ferocious, the public are not bound to exercise care or caution, without notice of the dangerous character of the particular animal. The keeper is not bound to exercise care with respect to them, in the absence of such notice, and we see no reason why the same rule should not apply to the public. The author of the article on "Animals," in the *American and English Encyclopedia of Law* (2d Ed., vol. 2, p. 372), says: "The better view is that contributory negligence, in its ordinary meaning, is not a good defense in an action to recover damages for injuries sustained from a vicious dog. But if a person, with knowledge of the evil propensities of a vicious dog, wantonly excites him, or voluntarily and unnecessarily puts himself in the way of such an animal, he will be adjudged to have brought the injury upon himself, and will not be entitled to recover." The author of the articles on the same subject in the *Cyclopedia of Law and Procedure* (volume 2, p. 380) says: "In some cases it held that plaintiff's contributory negligence will bar his right of recovery, while others hold that the owner will not be relieved from liability by a slight negligence or want of ordinary care on the part of the person injured, but that, to constitute a



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defense, acts must be proved, with notice of the character of the animal, which would establish that the injured person voluntarily brought the injury upon himself, or that amount to an unlawful act on plaintiff's part."

There seems to be a great diversity of opinion on this subject in the adjudged cases, depending upon the view of the court as to whether the keeper, with knowledge of the vicious nature of the animal, is liable, as an insurer, for all injuries it may inflict, or whether the liability depends upon negligence of the keeper, or whether permitting the vicious animal to be at large is such willful wrong that contributory negligence of the party injured is not a defense. In *Stumps v. Kelley*, 22 Ill. 140, it was said that "the principle of responsibility by an owner of an animal accustomed to commit injury to mankind, and knowing its vicious propensity, is imposed for all injuries it may inflict." But in *Keightlinger v. Egan*, *supra*, it was held that the plaintiff could not recover for an injury resulting from his own negligence. It is undoubtedly the rule in this state that if the party injured has been guilty of heedlessly placing himself in the way of a vicious dog with knowledge of its propensities, or has brought the injury upon himself by his own conduct, or his fault has proximately contributed to his injury, such facts will constitute a good defense. This defense, however depends upon knowledge, and it is only after notice that the public are required to be on their guard to avoid injury. It is not necessary for a plaintiff to aver and prove the exercise of care and caution for his own protection; but it is matter of defense. In this case, if there had been any evidence from which the jury might have found the plaintiff guilty of such contributory negligence as would prevent a recovery, it would have been error to ignore such defense in the instruction complained of. There was no evidence of that character, and no substantial defense based upon conduct of the plaintiff. It was not error to give the instruction. The judgment of the appellate court is affirmed.

Judgment affirmed.

PEOPLE *ex rel.* LINTON v. BROOKLYN HEIGHTS R. Co.

(Court of Appeals of New York, Oct. 7, 1902.)

[64 N. E. Rep. 788.]

#### Operation of Trains—Mandamus.

As the railroad law (Laws 1890, c. 565) places the responsibility of determining how many trains shall be run, and at what intervals of time, on the board of directors of a railroad company, mandamus will not lie in the first instance on the application of persons claiming to be aggrieved by failure of a railroad company to properly operate its trains to compel it to restore a continuous train service to a named station, which had been in part abandoned.

#### Same—Complaint to Railroad Commissioners.

Where the board of directors of a railroad company have abused the discretion committed to them by the statute as to the manner of operating trains on their road under the railroad law (Laws 1890, c. 565, § 161), complaint may be made to the board of railroad commis-

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sioners, which has express authority to determine, after hearing, whether the manner of operating the road is reasonable and expedient, so as to promote the security and convenience of the public.

**Same—Same—Mandamus.**

The determination of the board of railroad commissioners as to whether the method of operating a railroad is reasonable, as provided by the railroad law (Laws 1890, c. 565, § 161), is, by section 162, enforceable in the courts by mandamus.

**Same—Same—Review.**

The appellate division, on review by certiorari of an application for mandamus to enforce the determination of the board of railroad commissioners as to the proper operation of a railroad company, has the power to examine the facts.

**Appeal from supreme court, appellate division, Second department.**

Application by the people, on the relation of Edward F. Linton, for a writ of mandamus to the Brooklyn Heights Railroad Company. From an order of the appellate division reversing an order of the special term (75 N. Y. Supp. 202) directing the issuance of a peremptory writ pursuant to a verdict of the jury, the relator appeals. Affirmed.

A short time prior to April 1, 1900, two companies owned all of the elevated railroads in Brooklyn, but at that date defendant acquired by lease possession and control of all such elevated roads, and has since operated them. Defendant's elevated railroad system extends from the termini at the Brooklyn Bridge and Broadway Ferry to the terminus at Cypress Hills, a system of two main lines, one from Brooklyn Bridge and one from Broadway Ferry, converging at East New York, and thence proceeding by a single road easterly to Cypress Hills; and also of a third subsidiary line connecting Fulton Ferry and the Brooklyn Bridge, and extending thence easterly on Broadway to East New York, and thence to Cypress Hills, known as the "Lexington Avenue Route"; making three lines westerly of East New York, all connected with the one line between East New York and Cypress Hills. August 15th following, defendant purchased a lot of land extending from Broadway to Fulton street at East New York, and constructed thereon a junction depot and a track system connecting the elevated road on Broadway with that on Fulton street, where previously these two railroads were about 200 feet apart, so that each passenger wishing to transfer at East New York from the elevated road on Fulton street to that on Broadway, and vice versa, had been required to descend the stairs, cross the block, ascend the stairs of the other road, and pay an additional fare. After such construction passengers were allowed to transfer from one road to the other without descending to the street, and without extra fare, and certain through trains were run without change of cars and without extra fare from one road to the other at East New York. In addition to the elevated railroads on Broadway and Fulton street, defendant operates a double-track street surface railroad running directly underneath these elevated

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roads,—one from the Broadway Ferry to East New York, and another from the Fulton Ferry to East New York, and thence, still continuing underneath the elevated road, easterly to Cypress Hills. After the construction of the union depot at East New York, surface railroad track connections were also made similar to those of the elevated roads, whereby the surface cars of defendant ran upon the grounds of the union depot, and passengers were given free transfer from the elevated roads to the surface roads, and vice versa, through the union depot in all directions. Among the other changes in the service made by defendant was the substitution of a belt line elevated service during certain hours between the bridge and East New York, the operation of which defendant claims necessarily prevented the company from operating all of the trains on the Lexington avenue route between the bridge and East New York as through trains, or on the Broadway road between Broadway Ferry and Cypress Hills, so that a person taking a belt line train was compelled to change cars at East New York to the elevated or surface lines for the purpose of continuing easterly toward Cypress Hills. During the hours when the belt line service was in operation the system was a single-car service on a 20 minutes headway on the elevated road between Cypress Hills and the union station, and increased service on the surface lines between the same points, to which transfers were made without extra charge; but during “rush hours”—from 5 to 10 a. m. and 4 to 8 p. m.—the belt line service was not employed, and defendant ran through elevated trains to Cypress Hills, as before, except on holidays, when there were no through trains, and on Sundays, when there were none, except in the summer, and then but a few hours. Relator complained of defendant’s refusal to run through trains to Cypress Hills during all hours as theretofore, and petitioned the court for a writ of mandamus. An alternative writ was issued, came on for trial, and resulted in a submission to the jury of a single question: “Does public necessity or convenience require that the defendant operate its elevated road system from and between the termini at the Brooklyn Bridge and Broadway Ferry and the terminus at Cypress Hills in the manner the same was operated prior to the 1st day of April, 1900?” The jury answered the question in the affirmative, and a writ of mandamus was issued by the special term, in which this finding was incorporated, and defendant commanded to operate its system as it did prior to April 1, 1900. The appellate division reversed the order of the special term, and the plaintiff appeals to this court.

Stephen C. Baldwin and Benjamin N. Cardozo, for appellant.

Charles A. Collin and William F. Sheehan, for respondent.

PARKER, C. J. (after stating the facts). We agree with the appellate division that the court had no power to grant a

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mandamus in this proceeding. The railroad law (Laws 1890, c. 565) confers upon the board of directors of every railroad corporation the power "to regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor" (section 4, subd. 8), and further provides that "every railroad corporation shall start and run its cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all passengers and property which shall be offered for transportation at the place of starting, within a reasonable time previously thereto, and at the junctions of other railroads, and at the usual stopping places established for receiving and discharging way passengers and freight for that train; and shall take, transport and discharge such passengers and property at, from and to, such places, on the due payment of the fare or freight legally authorized therefor" (section 34). Notwithstanding these provisions, according to the view adopted by the trial court, the discretion especially committed to the judgment of the board of directors of a railroad corporation may, upon the application of persons claiming to be aggrieved, be subjected to review by court and jury, and their determination in the premises substituted for that of the directors. The supreme court of the United States and this court have decided, however, that a writ of mandamus to compel a railroad to do a particular act can be issued only when by statute there is a specific legal duty on its part to do that act, and clear proof of a breach of the duty. *Railroad Co. v. Dustin*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1092; *People v. New York, L. E. & W. R. Co.*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484. In the latter case the defendant refused to build at the village of Hamburg, on its line, a building of sufficient capacity to accommodate its passengers. The village invoked the aid of the railroad commissioners of this state, who, after an examination of the matter, determined that such a station as was asked for should be built, and reported their determination to the attorney general, who instituted an action in behalf of the people to compel its construction by the defendant. The mandamus was granted at special term and affirmed at general term (40 Hun, 570), but in this court it was held that mandamus would not lie, inasmuch as the duty to erect the station was not plainly imposed by statute. In the course of the opinion Judge Danforth said: "As the duty sought to be imposed upon the defendant is not a specific duty prescribed by statute, either in terms or by reasonable construction, the court cannot, no matter how apparent the necessity, enforce its performance by mandamus. It cannot compel the erection of a station house, nor the enlargement of one. The power of the company to provide such buildings is, under the statutes, a permissive one only. If the corporation chooses to exercise it, it may. The statute

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does not exact it. \* \* \* As to that the statute imposes an authority only, not a command, to be availed of at the option of the company in the discretion of its directors, who are empowered by statute to manage 'its affairs,' among which must be classed the expenditure of money for station buildings or other structures for the promotion of the convenience of the public, having regard also to its own interest. With the exercise of that discretion the legislature only can interfere." This case was cited with approval by the supreme court of the United States in the *Dustin Case*, *supra*. We agree, therefore, with the conclusion of the appellate division that mandamus will not lie in this case to compel defendant to operate its road in the same manner as it operated it prior to April 1, 1900, because the statute enjoins no such duty upon it, but instead submits the responsibility of determining how many trains shall be run, and at what intervals of time, to its board of directors.

In the event of an abuse of the discretion committed to a board of directors the legislature has, however, provided a remedy. The legislature authorized the creation of railroad corporations in the first instance, and conferred upon them broad powers, the exercise of which it could subsequently regulate, within reasonable limits. When the teachings of experience made it clear that occasionally the directors of railroads do not sufficiently recognize and provide for the convenience and necessities of the public, the legislature, by chapter 353 of the Laws of 1882, created a board of railroad commissioners, and conferred upon them the power, upon due notice to the railroad, and after a hearing, to determine whether "repairs are necessary upon any railroad within this state, or that any addition to the rolling stock, or any addition to or change of the stations or station houses, or that additional terminal facilities shall be afforded, or that any change in the rates or fare for transporting freight or passengers, or that any change in the mode of operating the road and conducting its business is reasonable and expedient in order to promote the security, convenience and accommodation of the public." It was under this act that the railroad commissioners, in *People v. New York, L. E. & W. R. Co.*, *supra*, took action looking to the building of a railroad station at Hamburg. The commissioners decided the station should be built, but were without power to enforce their decision, and the statute conferred no authority on the courts to enforce it. When the controversy came before this court, it pointedly called attention to the fact that the statute had clothed the commissioners with judicial powers to hear and determine such questions, but that the law failed in effectiveness because of its omission to furnish a remedy. The court said: "The railroad commissioners are powerless, and, as the law now stands, neither the attorney general of the state nor its courts can make their order effectual." Subsequently the railroad commissioners,



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in their report to the legislature, referred to this decision, repeating its recommendations of amendments authorizing mandamus to enforce decisions of the board. 1888, vol. 1, pp. 22, 23. The result was that in the revision of the railroad law the commissioners of statutory revision incorporated in their report to the legislature of 1890 a new provision, which, with slight amendment, is now contained in sections 161 and 162 of the railroad law. In that report attention was expressly called to the fact that the provision authorizing mandamus, in certain cases, to enforce the recommendations of the board, was new. The present state of the law, therefore, is that in a number of matters which in the first instance are committed to the discretion of the directors there may be upon notice and after hearing a determination by the railroad commissioners differing in part or in toto from the action of the directors and which supersedes it; and included within such law is the right to determine whether "the mode of operating the road and conducting its business is reasonable and expedient in order to promote the security, convenience, and accommodation of the public"; and the determination thus made may be enforced in the courts by mandamus. This judicial determination of the commissioners, whether favorable to complainant or railroad, may be reviewed by the court by certiorari, on which review the appellate division has the power and upon it rests the duty, of examining the facts. People *v.* Board of Railroad Com'rs, 158 N. Y. 421, 53 N. E. 1130; *Id.*, 160 N. Y. 202, 54 N. E. 697. Hence the legislature—in which is vested the power to regulate and control, within reasonable limits, the affairs of the corporations brought into existence by its permission—has provided a method by which certain matters committed to the discretion of the directors of railroads in the first instance may, in case of seeming abuse of such discretion, be examined by a board of state officers, who are in receipt of regular financial reports from all railroad companies, have power to make personal investigation of corporation books, and opportunity for personal inspection, observation, and examination, and can bring to their aid experts in every department of railroad construction or operation. Such officers necessarily become specially skilled in passing upon such questions; but before they can make any determination there must be a hearing upon notice, with opportunity for both the aggrieved party and the railroad to present evidence, after which their determination may be made; but, whether it be made in favor of one party or the other, it is open to review by the courts upon application of either party. It is apparent, therefore, that the relator mistook his remedy, if he has a substantial grievance, for it should have been presented to the railroad commissioners, who have been given by the legislature an authority which the court does not possess of making a determination in relation to grievances which parties think they have by reason of the



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manner in which the directors have disposed of the questions, among others, of construction and operation, conferred upon them by the legislature, and later made subject to such changes as might be directed by the railroad commissioners after hearing had, which may in turn be reviewed by the court, as we have pointed out.

The order should be affirmed, with costs.

GRAY, O'BRIEN, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

Order affirmed.

## NEW v. SOUTHERN RY. CO.

(*Supreme Court of Georgia, Aug. 7, 1902.*)

[42 S. E. Rep. 391.]

## Hiring Out Service of Son—Releasing Claims for Injury—Validity of Contract.

A contract whereby a father hires his minor son to another, and releases him from all liability for "damages for any injuries sustained" by the son while in the employer's service, will, when such contract can, under the facts of a case arising thereunder, be properly treated as valid and binding, defeat a recovery by the father for the loss of the value of the son's services during minority, even where such loss is occasioned by the homicide of the minor.

## Same—Same—Same.\*

Such a contract, though made with a railway company, is valid and binding to the extent of exempting the latter from liability for negligent acts of itself or servants which are not criminal.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by W. B. New against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Arnold & Arnold, for plaintiff in error.

Dorsey, Brewster & Howell and Sanders McDaniel, for defendant in error.

LUMPKIN, P. J. The Southern Railway Company employed as a switchman Looney Oscar New, the minor son of W. B. New. The latter entered into a written contract with the company, by which he, among other things, stipulated as follows: "I further hereby agree and consent that said company is by these presents released and forever acquitted from all or any claim or liability to me for damages for any injuries sustained by said Looney Oscar New while in its employment; and also that said company may pay all wages and other moneys due or growing out of said employment direct to him, and receive acquittance therefor from him in his own name." The minor was killed while in the service of the company, and the father brought an action for the value of his services up to the time when he would have attained

\*See notes at end of case.

majority. After the plaintiff had closed, the defendant introduced in evidence the abovementioned contract, and the court directed a verdict in its favor, on the ground that this contract "barred any right of the plaintiff to recover." To this W. B. New excepted. The case, as here presented and argued, turns upon the two questions dealt with in the discussion which follows.

1. It was insisted in behalf of the plaintiff in error that, as the contract purported to relieve the company only from such damages as might arise from "injuries" sustained by the minor, it did not apply to damages resulting to the father from the son's death. While "injury" and "death" are by no means synonymous, it is certainly true that, relatively to a father seeking to recover for the lost services of his minor child, it is immaterial whether the tort from which his loss originated was one which occasioned the child physical injury, destroying his ability to labor, or one which, by causing his death, brought about the same result. So far as the alleged right of W. B. New to have compensation from the company was concerned, the killing of his son by it was, to all practical intents and purposes, the same as the injuring of him by it; for the gist of his action was the loss of the son's services. See *Frazier v. Railroad Co.*, 101 Ga. 70, 28 S. E. 684. The company, in contracting with New for a release from damages for injuries sustained by the son, was manifestly seeking to free itself from damages which, but for the contract, the father might claim because of such injuries; and in this view it is without doubt proper to construe the term "injuries," used in the contract, as having been intended to apply to any and all kinds of bodily harm, whether resulting in partial or total disability of the minor or in his death.

2. The remaining and more important contention of counsel for the plaintiff in error is that, inasmuch as the contract, if enforced, will, in effect, relieve the company of liability for the consequences of its own negligence, it is for this purpose, at least, void, as being contrary to public policy. Our ruling on this branch of the case is expressed in the second head-note. In the case of *Railroad Co. v. Bishop*, 50 Ga. 465, this court held that a contract between a railroad company and its employee, exempting the former from damages resulting from its own negligence, was, save as to "any criminal neglect of the company or its principal officers," valid. In that case the action was by an employee for personal injuries. The ruling therein made was followed and applied in *Railroad Co. v. Strong*, 52 Ga. 461, which was an action by a widow for the homicide of her husband; and it was decided that, as the contract was binding upon him, her right of action was cut off. A similar case—that of *Hendricks v. Railroad Co.*—appears in the same volume, page 467. The correctness of the rule laid down in *Bishop's Case* was recognized in that of *Galloway v. Railroad Co.*, 57 Ga. 512, which was also an action for

personal injuries, brought by an employee against the company. These cases were all decided before the passage of the act of February 15, 1876, "to define and punish criminal negligence," the provisions of which have been codified (Penn. Code, § 115) as follows: "If any person employed in any capacity by any railroad company doing business in this state shall, in the course of such employment, be guilty of negligence, either by omission of duty or by any act of commission, in relation to the matters intrusted to him, or about which he is employed, from which negligence serious bodily injury, but not death, occurs to another, he shall be guilty of criminal negligence, and shall be punished by confinement in the penitentiary not less than one nor more than two years, in the discretion of the court." In the case of *Cook v. Railroad*, 72 Ga. 48, which was an action by a widow for the homicide of her husband, this court, in a decision rendered by two justices, held, in effect, that, after the passage of the above-mentioned act, any negligence on the part of a railroad company or of its servants from which the death of an employee resulted was necessarily "criminal negligence." It seems, however, that the two justices by whom the case was decided entirely overlooked the fact that the act of 1876 expressly exempted from the operation of its provisions all cases in which deaths were caused. It is clear that the purpose of the general assembly in passing this act was to create a new class of criminal offenses, which should embrace all acts of negligence on the part of railroad employees, whether of commission or of omission, from which serious bodily injury, "but not death," might result; and equally clear that there was no intention to change existing laws with respect to unlawful homicide, or the punishment therefor. We are, therefore, satisfied that a grave error was committed in making the *Cook Case* turn upon the act of 1876, which really had no bearing upon it. The court distinctly recognized the correctness of the settled rule that a railroad company could lawfully stipulate for exemption from liability to an employee for damages resulting from acts of negligence not criminal, but made a mistake in holding that the act of 1876 rendered any negligent act of a railroad employee from which death resulted per se felonious. Under a proper application of the rule just stated, the case should have been made to turn upon the question whether or not, under the law as it stood, without reference to the act of 1876, the negligence causing Cook's death was criminal and indictable. As this decision was not rendered by a full bench, it is not binding as authority; and, as it was manifestly based upon an erroneous view with respect to the true intent and meaning of the act of 1876, it will not be followed. This court, in *Fulton Bag & Cotton Mills v. Wilson*, 89 Ga. 318, 15 S. E. 322, upon a review of the cases above mentioned, reaffirmed the rule, in so far as the same was not modified by the act of 1876 touching railroad employees, that,

“as between employer and employee, the latter in the contract of hiring may assume all risks appertaining to the service, save such as arise from criminal negligence.” We have endeavored to show that the act referred to has no application at all to an action against a railroad company for a homicide, and that when, in defense to a suit, a contract like that relied on in the present case is set up by the company, its efficacy should be made to depend upon whether or not the act causing the death was criminal, without regard to the provisions of section 115 of the Penal Code, which was, as above stated, codified from the act of 1876. The evidence in the present case did not, so far as this court is informed, show that any employee of the company was guilty of a criminal act from which the death of the plaintiff's son resulted. In this connection the bill of exceptions merely discloses that “the testimony for the plaintiff tended to support the declaration as to the allegations of negligence.” We have carefully read these allegations, and they neither declare nor even intimate that any employee of the defendant was guilty of a criminal or indictable act. It must, therefore, be assumed that no such acts were proved, and it follows that the plaintiff in error has not made it appear that the court below erred in holding that the contract into which he entered was, as applied to the facts proved, void, because contrary to the public policy of this state. If the plaintiff in error had brought up all the evidence, and an examination of it showed that, as matter of law, the defendant's employees were guilty of criminal negligence, the question before us would be altogether different.

As the contract relied on, had it been between the deceased and the company, would certainly, but for the act of 1895, which will presently be more fully noticed, have been binding, to the extent herein laid down, upon him, it must, to that extent, be binding upon the father, unless the act just referred to contains something requiring a holding to the contrary. It is “An act to declare all contracts between master and servant, made in consideration of employment, whereby the master is exempted from liability to the servant, arising from the negligence of the master or his servants, as such liability is now fixed by law, void as against public policy.” Acts 1895, p. 97. The provisions of this act now appear in Civ. Code, § 2613, which reads as follows: “All contracts between master and servant, made in consideration of employment, whereby the master is exempted from liability to the servant arising from the negligence of the master or his servants, as such liability is now fixed by law, shall be null and void, as against public policy.” Whatever change the passage of this act made in existing laws, it is certain that by its express terms it applies exclusively to “contracts between master and servant.” It cannot, therefore, by construction, be applied to any other contracts. To attempt to do so would be an effort

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to legislate, which we have neither the inclination nor the authority to do.

It is proper to remark, before concluding, that this court cannot assume that the court below, without undertaking to pass upon the evidence bearing on the question of negligence, directed the verdict complained of on the theory that the effect of the contract was to manumit the plaintiff's son, and therefore deprive the father of all right to the son's services during his minority, and consequently of all right to compensation for the loss thereof. There is nothing in the bill of exceptions from which it could even be inferred that the court based its action in directing the verdict upon any such view of the contract. Indeed, it does not appear that the court undertook to pass at all upon the question whether or not the contract did operate to manumit the minor; and, as such was not its effect, it is certainly not to be presumed that the court erroneously held to the contrary, and in this way arrived at the conclusion that the plaintiff was not entitled to recover.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

## NOTES.

# VALIDITY OF CONTRACTS OF EMPLOYMENT PURPORTING TO EXEMPT EMPLOYER FROM LIABILITY FOR INJURIES TO SERVANT FROM NEGLIGENCE.

## I. In General.

1. General Rule.
2. Connecticut—Question Not Decided.
3. Statements and Illustrations of General Rule.
4. Disobeying Rule—Paper Construed Not to Stipulate for Exemption from Liability for Negligence.
5. Brakeman Required to Examine Machinery.

## II. Limitations of and Exceptions to General Rule.

1. Assumption of Risks from Defective Machinery.
2. Railroad Acting as Private Carrier.
3. Parent's Release of Claims for Injuries to Child.
4. Rule in Georgia.
5. Illustrations of Rule That Prevailed in Georgia.
6. English Doctrine.

## I. IN GENERAL.

### 1. General Rule.

A stipulation in a contract of employment for service with a railroad company that the compensation paid shall cover all risks incurred and liability for injuries from any cause whatever is opposed to public policy, and does not secure to the railroad company exemption from liability for negligence.

*United States.*—*Roesner v. Hermann* (C. C., Ind.), 8 Fed. 782, 10 Biss. (U. S.) 486; *Russell v. Richmond & D. R. Co.*, 47 Fed. 204; *Otis v. Pennsylvania Co.*, 71 Fed. 136.

*Alabama.*—*Richmond, etc., R. Co. v. Jones*, 92 Ala. 218, 9 So. 276; *Hissong v. Richmond & D. R. Co.*, 48 Am. & Eng. R. Cas. 377, 91 Ala. 514, 8 So. 776.

*Arkansas.*—*Little Rock & Ft. S. R. Co. v. Eubanks*, 31 Am. & Eng. R. Cas. 176, 48 Ark. 460, 3 S. W. 808.

*Illinois.*—*Maney v. Chicago, etc., R. Co.*, 49 Ill. App. 105; *Chicago, etc., Coal Co. v. Peterson*, 39 Ill. App. 114.



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*Kansas.*—*Kansas Pac. R. Co. v. Peavy*, 29 Kan. 169.

*Kentucky.*—*Newport News, etc., R. Co. v. Eifert*, 15 Ky. L. Rep. 575; *Louisville Bagging Co. v. Dolan*, 13 Ky. L. Rep. 493.

*Missouri.*—*Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149.

*New York.*—*Runt v. Hearing (C. Pl. Gen. F.)*, 2 Misc. (N. Y.) 105.

In *Purdy v. Rome, etc., R. R. Co.*, 125 N. Y. 209, 26 N. E. 255, 21 Am. St. Rep. 736, this question was not decided. It is there held that an agreement executed by a railroad employee after he had entered the service, releasing the company from all liability for any injury to him from the company's negligence, is void for lack of consideration, where there is no promise on the part of the company to give him other or new employment or to retain his services.

In this case it is said in the opinion: "It might even then (if there had been a sufficient consideration for the agreement) be urged that public policy forbids the exaction of such a contract from its employees by railroad and other corporations, and upon that question we desire to express no opinion at the present time."

*North Carolina.*—*Mason v. Richmond & D. R. Co.*, 53 Am. & Eng. R. Cas. 183, 111 N. Car. 482, 16 S. E. 698.

*Ohio.*—*Lake Shore & M. S. R. Co. v. Spangler*, 44 Ohio 471.

*Pennsylvania.*—*Pennsylvania R. Co. v. Butler*, 57 Pa. St. 335.

*Tennessee.*—*Memphis, etc., R. Co. v. Jones*, 2 Head (Tenn.) 517.

*Texas.*—*Bonner v. Bean*, 80 Tex. 152, 15 S. W. 798.

*Virginia.*—*Johnson's Adm'r v. Richmond & D. R. Co.*, 86 Va. 975, 11 S. E. 829.

## 2. Connecticut—Question Not Decided.

In *Darrigan v. New York, etc., R. R. Co.*, 52 Conn. 285, 23 Am. & Eng. R. Cas. 438, it is said in the opinion: "Among the rules of the company which had been placed in the plaintiff's hands is the following: 'The regular compensation of employees covers all risk or liability to accident.' The record does not show that the defendant claimed in the court below that this was equivalent to a contract exempting it from liability for its own negligence; nor do the reasons of appeal present any such question. When such a question is presented we may be called upon to consider whether public policy will permit a railroad company to make such a contract with its employees."

## 3. Statements and Illustrations of General Rule.

The liability of companies for injuries caused to their servants by the carelessness of other employees who are placed in authority and control over them, is founded upon considerations of public policy, and it is not competent for a railroad company to stipulate with its employees at the time, and as part of their contract of employment, that such liability shall not attach to it. *Lake Shore & M. S. R. Co. v. Spangler*, 44 Ohio St. 471; *Runt v. Herring*, 2 Misc. 105, 21 N. Y. Supp. 244.

In *Roesner v. Hermann (C. C., Ind.)*, 8 Fed. 782, it is said in the opinion: "When the defendant's negligence in supplying his employees with unsafe machinery has caused the death of the latter, the law will not allow the defendant to say—as in effect he does say in this answer—'It is true that my machinery was defective and unsafe, and my negligence caused the death of my employee, but I am not liable to those who have suffered from the loss of his life, because I had a contract with my employee which secured to me the right to supply him with defective and unsafe machinery, and to be negligent.'"

A stipulation in a contract of employment for service on a railroad that the compensation paid shall cover all risks incurred, and liability to accident from any cause whatever, and if an employee is disabled by accident or other cause, the right to claim compensation for injuries will not be recognized, is opposed to public policy, and does not secure to the railroad company exemption from liability for negligence. *Hissong v. Richmond & D. R. Co.*, 48 Am. & Eng. R. Cas. 377, note, 91 Ala. 514, 8 So. 776; *Kansas Pac. R. Co. v. Peavy*, 29 Kan. 169.

A contract by which a person, when he enters the employ of a railroad company, "agrees with said railway, in consideration of such employment, that he will take upon himself all risks incident to his



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position on the road, and will in no case hold the company liable for any injury or damage he may sustain, in his person or otherwise by accidents or collisions on the trains or road, or which may result from defective machinery, or carelessness or misconduct of himself or any other employee and servant of the company," is not binding on him so as to relieve the company from liability for an accident caused by its failure to repair its road. *Little Rock & Ft. S. R. Co. v. Eubanks*, 31 Am. & Eng. R. Cas. 176, 48 Ark. 460, 3 S. W. 808.

In this case it is said in the opinion: "It is an elementary principle in the law of contracts that, 'modus et conventio vincunt legem,'—the form of agreement and the convention of parties override the law. But the maxim is not of universal application. Parties are permitted, by contract, to make a law for themselves only in cases where their agreements do not violate the express provisions of the law, nor injuriously affect the interests of the public. *Broom, Leg. Max.* 543; *Kneetle v. Newcomb*, 22 N. Y. 249. Our constitution and laws provide that all railroads operated in this state shall be responsible for all damages to persons and property done by the running of trains. *Const.* 1874, art. 17, sec. 12; *Mansf. Dig.*, sec. 5537. This means that they shall be responsible only in cases where they have been guilty of some negligence; and it may be questionable whether it is in their power to denude themselves of such responsibility by a stipulation in advance. But we prefer to rest our decision upon the broader ground of considerations of public policy. The law requires the master to furnish his servant with a reasonably safe place to work in, and with sound and suitable tools and appliances to do his work. If he can supply an unsafe machine or defective instruments, and then excuse himself against the consequences of his own negligence by the terms of his contract with his servant, he is enabled to evade a most salutary rule. In the English case above cited (*Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357), it is said this is not against public policy, because it does not affect all society, but only the interest of the employed. But surely the state has an interest in the lives and limbs of all its citizens."

An agreement, in consideration of being employed, purporting to exempt the company from negligence, even when it causes death, is void. *Mason v. Richmond & D. R. Co.*, 53 Am. & Eng. R. Cas. 183, 111 N. Car. 482, 16 S. E. 698.

In this case it is said in the opinion: "It is settled as the almost universal rule in America that, though a common carrier of freight by contract upon consideration may relieve itself of the full measure of responsibility as an insurer, no limitation can in that way be placed upon its liability for its own negligence. *Smith v. Railroad Co.*, 64 N. Car. 235; 4 *Lawson, Rights, Rem. & Pr.*, sec. 1840; *Lawson, Cont.*, secs. 29-67. The same rule applies to agreements made by common carriers of passengers purporting to restrict their liability for injuries caused by their own negligence. Such contracts are void as against the public policy of the law. 4 *Lawson, Rights, Rem. & Pr.*, sec. 1913. This stringent rule of liability is said to rest upon the duty of the government to give unrestricted protection to the lives and limbs of its citizens. *Lawson, Cont.*, secs. 212-220. It would seem that the government owes it to the servant of a carrier to give to him the same protection of life and limb as to the passenger, by declaring void an agreement, in consideration of being employed, to excuse the company for negligence even when it causes death; and it has been so held, as far as our investigations have extended, in all of the courts except the supreme court of Georgia. *Railroad Co. v. Spangler*, 44 Ohio St. 471, 28 Am. & Eng. R. Cas. 319; *Railroad Co. v. Peavy*, 29 Kan. 169, 11 Am. & Eng. R. Cas. 260; *Railroad Co. v. Eubanks*, 48 Ark. 460, 31 Am. & Eng. R. Cas. 176; *Railroad Co. v. Jones*, 2 Head. 157; *Roesner v. Hermann*, 10 Biss. 486, 8 Fed. Rep. 782; 1 *Lawson, R. R.*, sec. 318. It is difficult to draw a distinction between contracts affecting only the safety of goods or animals or those affecting the lives and limbs of passengers, and those which vitally concern another large class of human beings. If public policy prohibits the recognition of the validity of a contract limiting liability

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for a paying passenger, or, as most authorities in this country maintain, even one riding on a free pass, upon what principle can the court refuse to extend the same protection to a class of people who are much more exposed to danger, and much more liable to be influenced to sign such agreements?"

It is the duty of a railroad company to make rules for the protection and safety of employees; but it cannot exempt itself from liability to employees for negligence by its rules and regulations. *Crew v. St. Louis, K. & N. W. R. Co.*, 20 Fed. 87.

#### 4. Disobeying Rule—Paper Construed Not to Stipulate for Exemption from Liability for Negligence.

Upon entering service a brakeman signed a writing, recognizing a rule of the company that couplings should only be done by means of a stick, without the brakeman going between the cars, and in the writing waived any claim for damages against the company for injuries received while disobeying the rule. It was held that the writing was not a contract exempting the company from liability for its own negligence. *Russell v. Richmond & D. R. Co.*, 47 Fed. 204.

In this case it appeared that the contract in question was in these words: "I fully understand that the rules of the Richmond & Danville R. R. Company positively prohibit brakemen from coupling or uncoupling cars, except with a stick, and that brakemen or others must not go between cars, under any circumstances, for the purpose of coupling or uncoupling, or for adjusting pins, etc., when an engine is attached to such cars or train; and, in consideration of being employed by said company, I hereby agree to be bound by said rule, and waive all or any liability of said company to me for any results of disobedience or infraction thereof."

It is said in the opinion: "It is contended with great earnestness and evidence of research that this paper is void as against public policy; that a railroad company cannot in advance contract with its employee for exemption from the consequences of its own negligence. It is not necessary to decide this point. The paper in question does not contract for any such exemption on the part of the defendant. It is a declaration on the part of the intestate that the company will not be liable to him for the consequences of certain acts on his part, which the railroad company forbid him to perform. There can be no objection to this."

#### 5. Brakeman Required to Examine Machinery.

A brakeman was killed by the breaking of a brake which he was attempting to set. Four of the spokes of the brake wheel broke where they joined the rim, and the ends were rusty. The company put in evidence an agreement signed by the brakeman, providing that before working with any cars, engines, machinery, or tools he should examine their condition, and that he should take sufficient time to make the examination, and refuse to obey any order which would expose him to danger. It was held that such agreement only required the brakeman to be attentive and vigilant to discover defects in the machinery, and to refrain from using machinery if he learned it was defective; but it was no defence where it appeared that the defect could only be discovered by an expert. *Pratt v. Lake Shore & M. S. R. Co.*, 45 N. Y. S. R. 715, 63 Hun 616, 18 N. Y. Supp. 682, affirmed in 136 N. Y. 654, mem., 32 N. E. 1016, 49 N. Y. S. R. 915.

## II. LIMITATIONS OF AND EXCEPTIONS TO GENERAL RULE.

### I. Assumption of Risks from Defective Machinery.

In *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119, it is said in the opinion: "It would be an unwarranted construction of the statute (Stat. 1887, chap. 270) which would tend to defeat its object, to hold that laborers are no longer permitted to contract to take the risk of working where there are peculiar dangers from the arrangement of the place, and from the kind or quality of the machinery used. Nothing but the plainest expression of intention

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on the part of the legislature would warrant giving the statute such an interpretation. We have no doubt that one may expressly contract to take the obvious risks of danger from inferior or defective machinery as well since the enactment of this statute as before. If he does so, his employer owes him no duty in respect to such risks; and, if he is hurt from a cause included in the contract, the defect is not within the terms of the statute, the maxim *volenti non fit injuria* applies, and he cannot recover."

## 2. Railroad Acting as Private Carrier.

In *Pittsburg, C., C. & St. L. R. Co. v. Mahoney*, 148 Ind. 196, 46 N. E. 917, 40 L. R. A. 101, it is said in the opinion: "It had been urged in the briefs for appellee that a contract of release from the results of negligence was void, as against public policy, and the following authorities were cited in support of that proposition: *Roesner v. Hermann*, 8 Fed. 782; *Lake Shore & M. S. R. Co. v. Spangler*, 44 Ohio St. 471, 28 Am. & Eng. R. Cas. 319; *Western & A. R. Co. v. Bishop*, 50 Ga. 465; *Kansas P. R. Co. v. Peavy*, 29 Kan. 169, 11 Am. & Eng. R. Cas. 260, 44 Am. Rep. 630; *Johnson v. Richmond & D. R. Co.*, 86 Va. 975, 11 S. E. Rep. 829; *Louisville & N. R. Co. v. Orr*, 91 Ala. 548, 8 So. 360; *Hissong v. Richmond & D. R. Co.*, 91 Ala. 514, 8 So. 776; 2 *Thomp. Neg.* 1025; 1 *Cent. L. J.* 465; *Arnold v. Illinois C. R. Co.*, 83 Ill. 273, 25 Am. Rep. 383; *Jacksonville S. E. R. Co. v. Southworth*, 135 Ill. 250, 25 N. E. 1093; *Purdy v. Rome, W. & O. R. Co.*, 125 N. Y. 209, 26 N. E. 255; *Maney v. Chicago, B. & Q. R. Co.*, 49 Ill. App. 105; *Newport News & M. V. Co. v. Eifort*, 15 Ky. L. Rep. 600; *Runt v. Herring*, 2 *Misc. (N. Y.)* 105. These authorities probably sustain the proposition stated when applied to exemption against negligence in the discharge of a public or quasi public duty, such as that owing by a common carrier to an ordinary shipper, passenger, or servant. In a recent decision of this court, however, that of *Louisville, N. A. & C. R. Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, we recognize the well-established rule that railway companies, although public or common carriers, may contract as private carriers, such as that of transporting express matter for express companies, as such matter is usually carried, and in that capacity may properly require exemption from liability for negligence as a condition to the obligation to carry. See also, *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542; *Hosmer v. Old Colony R. Co.*, 156 Mass. 506, 31 N. E. 652; *Bates v. Old Colony R. Co.*, 147 Mass. 255, 17 N. E. 633; *Chicago, M. & St. P. R. Co. v. Wallace*, 24 U. S. App. 589, 66 Fed. Rep. 506, 30 L. R. A. 161; *Coup v. Wabash, St. L. & P. R. Co.*, 56 Mich. 111, 56 Am. Rep. 374; *Forepaugh v. Delaware, L. & W. R. Co.*, 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.*, 36 U. S. App. 152, 70 Fed. Rep. 201, 17 C. C. A. 62, 30 L. R. A. 193; *Quimby v. Boston & M. R. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; *Muldoon v. Seattle City R. Co.*, 10 Wash. 311, 38 Pac. 995; *Griswold v. New York & N. E. R. Co.*, 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115."

## 3. Parent's Release of Claims for Injuries to Child.

The release by a parent to an employer, upon a minor son being hired, of all claims for damages for injuries the minor may receive in the employment, extends to such damages as the parent would have been entitled to recover, but for the release, up to the majority. But such release does not affect the right to damages by the minor, save to the extent his parent might claim. *International & G. N. R. Co. v. Hinzle*, 82 Tex. 623, 18 S. W. 681.

## 4. Rule in Georgia.

According to the rule that prevailed in this state, an employee could contract with a railroad to take upon himself all risks incident to his business or arising from the negligence of the company, except those resulting from the criminal negligence of the company. *Western & A. R. Co. v. Bishop*, 50 Ga. 465; *Galloway v. Western & A. R. Co.*, 57 Ga. 512; *Hendricks v. Western & A. R. Co.*, 52 Ga. 467.

But now, however, although an injured employee may by contract

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waive his right to sue for injuries not arising from criminal negligence on the part of the company, or its other employees, under Code 1895, vol. 3, sec. 115, any negligence, either of omission or commission, on the part of other employees of the road, in connection with their business, from which serious injury results, constitutes criminal negligence, and a contract waiving the right to sue for injuries resulting therefrom is contrary to public policy, and void. *Cook v. Western & A. R. Co.*, 28 Am. & Eng. R. Cas. 317, 72 Ga. 48.

**5. Illustrations of Rule That Prevailed in Georgia—Injury Received on Another Road.**

Where an employee agrees to assume all risk incident to his employment, the fact that he was running over another railroad at the time of the injury does not release him from such agreement. If, while running over such other road, he is in the employ of the former company, so as to make it liable for the injury, his agreement remains binding. *Galloway v. Western & A. R. Co.*, 57 Ga. 512.

**Same—Failure to Use Best Appliance.**

An employee of a railroad, a part of whose business was to couple cars, who by special contract had taken upon himself the risks incident to his station, cannot, if he be injured, escape the effect of his contract by showing that a particular kind of link or coupler, used by him for ten months, was a less safe instrument for the purpose than other kinds of links or couplers. *Western & A. R. Co. v. Bishop*, 50 Ga. 465.

**Same—Employees' Assent to Rule Must Be Obtained.**

A rule of the railroad company that the regular compensation paid employees for their services covers all risks, that employees shall not be entitled to compensation for injuries, and that the remaining in the service will be considered an acceptance of such condition of employment, is not binding upon an employee whose attention has not been called to such rule and who has not expressly agreed to it. *Georgia Pacific R. Co. v. Dooley*, 86 Ga. 294, 48 Am. & Eng. R. Cas. 437.

**Same—Knowledge of Defects.**

It is not necessary, in order to exempt a company from liability, that the unsafe condition of a tool or implement should be known to an employee before or at the time of the making of a contract releasing the company from liability for its negligence. *Western & A. R. Co. v. Bishop*, 50 Ga. 465.

**6. English Doctrine.**

In 1880, the English parliament passed the "Employers' Liability Act," the object of which was to make employers liable for injuries to workmen caused by the negligence of those having supervision and control of them. In *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357, it was held that a workman might contract himself and his representatives out of the benefits of this act.

In this case Field, J., said: "The plaintiff is suing, not as administratrix of her husband, but as his widow, to recover under Lord Campbell's Act pecuniary loss sustained by her through her husband's death. The Employers' Liability Act was passed to obviate the injustice to workmen that employers should escape liability where persons having superintendence and control in the employment were guilty of negligence causing injury to the workmen. The employer was, before the passing of the act, clearly liable where he himself was guilty of negligence. It is also clear now that for the negligence of a fellow workman not coming within any of the classes of persons specified in the act the employer is not liable. But before the passing of the act *Wilson v. Merry*, L. R., 1 H. L., sec. 326, had decided that where the injury was caused though the negligence of a superior person in the employment, the workmen could recover no damages from their common employer. The object of the act was to get rid of the inference arising from the fact of common employment with respect to injuries caused by any persons belonging to the specified classes. If, therefore, the person injured in the present case had not made the contract which is relied on to exempt the defendant from liability, he would himself,

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during his lifetime, clearly have been entitled to recover. It is also clear that the terms of the contract do expressly stipulate that the workmen shall not look to the defendant for compensation for any injury received in the employment, and that the deceased accepted the employment and was willing to continue working on those terms. There is no suggestion that the contract was induced by fraud or by force, or made under duress, and it was not a naked bargain made without consideration, for the defendant contributed an amount to the club equal to the whole amount of contributions from the workmen. I am unable to concur in the view taken by the learned county court judge of these facts and of the statute. He held that the contract was against public policy. It is at least doubtful, whether where a contract is said to be void as against public policy, some public policy which affects all society is not meant. Here the interest of the employee only would be affected. It is said that the intention of the legislature to protect workmen against imprudent bargains will be frustrated if contracts like this one are allowed to stand. I should say that workmen as a rule were perfectly competent to make reasonable bargains for themselves. At all events, I think the present one is quite consistent with public policy."

A. R. Y.

ABRAHAM v. OREGON & C. R. Co. *et al.*

(Supreme Court of Oregon, July 21, 1902.)

[96 Pac. Rep. 653.]

## Grant of Land—Railroad Purpose—Eating House for Public Accommodation.\*

Where land is granted to a railroad company for all legitimate railroad and depot purposes, and a hotel and eating house is erected on the land as an incident to the operation of the road, that accommodations are granted the general public apart from strictly railroad business does not render the use of the land repugnant to the grant.

## Same—Same—Same—Presence of Another Eating House.

The fact that there is another eating house or hotel near by, ample to accommodate passengers and employees, does not render the use of the land repugnant to the grant.

## Same—Same—Same.\*

The station where the land was situated was a small one, and a large force of men necessarily made their headquarters at the station. Freight and delayed passenger trains were accustomed to stop at the station for meals, though no passenger trains stopped regularly for such purpose. There was no other station where employees or passengers could be accommodated with means nearer than 35 miles: *held*, that the construction of the hotel and eating house on the land was a use of it for a legitimate railroad purpose.

Appeal from circuit court, Douglas county; J. W. Hamilton, Judge.

Suit by Morris Abraham as administrator of the state of Sol Abraham, deceased, substituted for Sol Abraham, against the Oregon & California Railroad Company and others. From a judgment dismissing his complaint, plaintiff appeals. Affirmed.

J. C. Fullerton and Albert Abraham, for appellant.

W. D. Fenton and R. A. Leiter, for respondents.

\*See Abraham v. Oregon & C. R. Co. (Ore.), 17 Am. & Eng. R. Cas., N. S., 250, and note, 257 et seq.



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BEAN, J. This is a suit to enjoin the defendants from operating, or permitting to be operated, a hotel or eating house on land conveyed to the defendant Oregon & California Railroad Company, by the plaintiff and his grantors, "for all legitimate railroad, depot, and warehouse purposes," on the ground that it is maintained and operated for the accommodation of the general public, and is not necessary or convenient for the operation of defendants' railway. The complaint was held sufficient on demurrer (*Abraham v. Railroad Co.*, 37 Or. 495, 60 Pac. 899, 82 Am. St. Rep. 779), and, upon the cause being remanded to the court below, the defendants answered. They deny that the hotel or eating house complained of is not necessary or convenient for the operation of the railway, and affirmatively allege that the defendant the Southern Pacific Company, finding that the establishment of an eating station was necessary in order to carry out and facilitate the operation of its railway, and to enable its employees and passengers to be fed, housed, and entertained, leased a portion of said premises on August 1, 1897, to the defendant Clarke, in consideration of which she covenanted and agreed to erect and maintain thereon, at her own expense, a good and substantial building "for eating house and hotel purposes," for the use and accommodation of its passengers and employees; that thereafter, in pursuance of such lease, Mrs. Clarke did construct, according to plans approved by the Southern Pacific Company, a good and substantial building, which she opened on the 25th of November, 1897, to the traveling public and the passengers and employees of the railway company, and has ever since maintained and operated it as an eating house or hotel, and that during all of such time its maintenance was, and is now, necessary and convenient for the use and operation of the railway. A demurrer to the answer was overruled, and a reply filed, putting in issue the material allegations thereof. Upon the trial the court found from the evidence that it was and is necessary for the railway company to have and maintain at Glendale an eating station for the accommodation of its passengers and employees; that the hotel operated by the defendant Clarke was constructed, and has been maintained, at the company's instance and request, for that purpose, and that it is not violative of any covenant in the deed of conveyance from plaintiff to the defendant the Oregon & California Railroad Company, although it has been and is kept open to the general public. The complaint was thereupon dismissed, and the plaintiff appeals.

The law of this case was settled on the former appeal. It was there said: "Where hotels or eating houses appear to be reasonably necessary for the convenience of its employees and passengers, their maintenance is a legitimate railroad purpose. But an eating house or hotel kept for the accommodation of the general public, and not as an incident to the operation and management of the railway, cannot be so con-



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sidered. As to whether a given hotel or eating house is maintained for railroad purposes is therefore largely a mixed question of law and fact, to be determined from the circumstances of each particular case." *Abraham v. Railroad Co.*, 37 Or. 495, 60 Pac. 899, 82 Am. St. Rep. 779. Within this doctrine, the maintenance of an eating house or hotel is a legitimate railroad purpose when the convenience of the employees and passengers of the company is subserved by it, but a hotel maintained for the general public alone is not. *State v. Baltimore & O. R. Co.*, 48 Md. 49. Yet, if an eating house or hotel is reasonably convenient and appropriate to the operation and maintenance of the road, it may be built or operated by the railroad company, although depending for part of its patronage upon the general public. Much evidence was given in this case, tending to show the amount of patronage the hotel derived from the general public as distinguished from that of passengers and employees of the company; the witnesses being hopelessly in conflict upon the subject. But we do not understand that the character of its use is to be determined by segregating strictly railroad business from that done with the general public, and deciding as either may happen to preponderate. Nor is the question of the advisability of maintaining such a place for the convenience of passengers and employees affected alone by the number of people availing themselves of the privilege offered, or even by the number of trains scheduled to stop for meals. The locality, the nature of the physical surroundings, the traffic and business of the road, and many other circumstances, should be considered; and, after all, it must ultimately depend to a large extent upon whether the business is carried on in good faith, as an incident to the operation of the road, or is entirely disassociated from it. The courts cannot undertake to draw any nice distinction, or apply any arbitrary test, to determine the necessity of establishing or maintaining such places of entertainment by railway companies, and, so long as it appears that they are not wholly foreign to the business of the corporation, the courts will not interfere with them. In the very nature of things, much must necessarily depend upon the judgment and discretion of the officers and managers of the company. They establish and maintain eating stations with reference to fixed or probable schedules and operation of trains, peculiarities of varying locations, or other general needs and exigencies of the business, all of which are within their cognizance and knowledge; and their judgment should prevail so long as they do not divert the property to uses wholly foreign to its organization or the terms of the grant conveying it. *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 104 Mass. 1, 9, 6 Am. Rep. 181; *Peirce v. Railroad*, 141 Mass. 481, 6 N. E. 96; *Railroad Co. v. Wathen*, 17 Ill. App. 582, 589. Apply these principles to the case in hand, and there can be but one result. Glendale is a small station at the head of Cow Creek Canyon.

It is at the foot of a very difficult grade, where the company is obliged to keep helper engines stationed to assist heavy trains over the mountains. From Glendale to the mouth of the canyon is about 30 miles, along which the road runs through a narrow defile, making it expensive and difficult to maintain. It is necessary for the company to keep a large force of men constantly employed in the canyon for the purpose of patrolling and keeping the road in repair, who must necessarily make their headquarters at Glendale. In addition to this, freight and delayed passenger trains are accustomed to stop at the station for meals, and, although passenger trains have not stopped regularly for such purpose since the construction of the hotel in question, the evidence shows that, during a considerable portion of the time since the road was built, Glendale has been a regular eating station for passengers on the company's trains, and may become so again at any time. There is no other station where employees or passengers of the company can be accommodated with meals between Riddles, some 35 miles north, and Grants Pass, about the same distance south. The managers of the road testify that it is very desirable to have an eating house or hotel, under the supervision and control of the company, at Glendale, on account of the peculiar location of the town, and the necessity of providing board and lodging for the crews of the helper engines and freight trains, the men employed in patrolling and keeping the road in repair, and passengers traveling on its trains. It was for this purpose the hotel in question was built, according to plans submitted to and approved by the manager of the company, with a dining room large enough to accommodate 100 persons, but with only 8 or 10 sleeping rooms. It is argued, however, that there is no necessity for the defendants maintaining or operating an eating house or hotel, because the plaintiff is conducting one near the depot grounds, which is amply sufficient for the accommodation of the passengers and employees of the railway company. But the fact that some other person has provided accommodations which may be used if desired does not determine whether the defendants' eating house is or is not a legitimate railroad purpose. The testimony shows many reasons why it is desirable that eating houses and hotels at such stations as Glendale should be under the supervision and subject to the inspection of the managers of the railway company. Aside from this, however, if the hotel or eating house is reasonably convenient and appropriate to the maintenance and operation of the road it does not matter that it may come in competition with other places of like character, nor that it may furnish accommodations for persons not connected with the road. *Railroad Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356. The testimony further shows, and it is undisputed, that it is desirable and customary for railroad eating houses to have more or less outside business, as it helps pay expenses, and enables

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the proprietors to serve better meals and furnish better accommodations for the passengers and employees of the company. Such is the custom at other eating stations on the railroad, and there is no reason why it should not be followed in this instance. Our conclusion from the evidence is that the hotel or eating house maintained by the defendants, or under their supervision, is convenient and proper as an incident to the management and operation of the railroad, and is therefore a legitimate railroad purpose within the meaning of the deed from the plaintiff to the defendants.

The decree of the court below will therefore be affirmed.

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STILLWATER & M. ST. RY. CO. v. BOSTON & M. R. CO.

(*Court of Appeals of New York, June 27, 1902.*)

[64 N. E. Rep. 511.]

**Railroads—Intersections—Electric Lines.**

Laws 1850, c. 140, re-enacted in Railroad Law 1890, c. 565, § 4, subd. 5, conferred on every steam railroad the right to cross or unite its railroad with any other railroad before constructed, at any point on its road, and on the ground of such other railroad, with the necessary conveniences, in furtherance of the object of its connection. Section 12 provides that every railroad corporation whose road is intersected by any new railroad shall unite with such road in forming necessary intersections, and grant the requisite facilities: *held* to apply to the intersection and connection of a street railroad operated by electricity with a railroad operated by steam.

Appeal from supreme court, appellate division, Third department.

In the matter of the application of the Stillwater & Mechanicville Street Railway Company to obtain an order to unite tracks of such railroads. From an order of the appellate division (76 N. Y. Supp. 69), which reversed an order of the special term confirming the report of the commissioners and adjudging that the intersection be made, the petitioner appeals. Reversed.

David B. Hill and Thomas O'Connor, for appellant.

Lewis E. Carr and T. F. Hamilton, for respondent.

HAIGHT, J. This proceeding was instituted by the Stillwater & Mechanicville Street Railway Company to obtain an order permitting it to unite and connect the tracks of its railroad with those of the Boston & Maine Railroad Company in order to facilitate the free interchanging of cars between the two roads.

The Stillwater & Mechanicville Street Railway Company was organized under the general railroad law of this state, with the right to transport both passengers and freight, and is operated as an electric railroad by the trolley system. The Boston & Maine Railroad is a foreign corporation, organized under the laws of Massachusetts, and is operating a steam

railroad. It is contended upon its behalf that the statute does not authorize the court to compel a connection of the tracks of the two roads. The question, therefore, raised for our review is as to the proper construction of the statute.

The railroad law of 1890 (chapter 565, § 12) provides as follows: "Every railroad corporation, whose road is or shall be intersected by any new railroad, shall unite with the corporation owning such new railroad in forming the necessary intersections and connections, and grant the requisite facilities therefor; and if the two corporations cannot agree upon the amount of compensation to be made therefor or upon the line or lines, grade or grades, points or manner of such intersections and connections, the same shall be ascertained and determined by commissioners, one of whom must be a practical civil engineer and surveyor, to be appointed by the court, as is provided in the condemnation law; and such commissioners may determine whether the crossing or crossings of any railroad before constructed shall be beneath, at, or above the existing grade of such railroad, and upon the route designated upon the map of the corporation seeking the crossing or otherwise. All railroad corporations whose roads are or shall hereafter be so crossed, intersected or joined, shall receive from each other and forward to their destination all goods, merchandise and other property intended for points on their respective roads, with the same dispatch as, and at a rate of freight, not exceeding the local tariff rate charged for similar goods, merchandise and other property, received at and forwarded from the same point for individuals and other corporations." It will be observed that this statute contains two provisions, one for the crossing of the tracks of another railroad at, above, or beneath grade; and the other provides for the intersection of the tracks of such railroads, and upon the making of such connections the roads shall receive from each other and forward to their destination all goods, merchandise, and other property intended for points on their respective lines.

The court below seems to have been of the opinion that this statute had reference to steam railroads, and did not pertain to roads operated by electricity. In determining this question it becomes necessary to examine more fully the railroad law for the purpose of ascertaining the legislative intent. By referring to section 2 of the act, we find provisions for the incorporation of railroads, which is to be accomplished by the execution of a certificate by 15 or more persons which shall contain the name of the corporation, the number of years it is to continue, and the kind of road to be built or operated. The section contains other provisions, among which is subdivision 11 (as amended by Laws 1892, c. 676), which provides that, "if a street surface railroad, the names and description of the streets, avenues and highways in which the road is to be constructed." It is thus apparent that the

articles of incorporation provided for have reference to all kinds of railroads for public use, including steam railroads, street surface and electric roads. Again, passing to section 4, subdivision 5, of the act, we find that every railroad corporation, in addition to the power given by the general stock corporation law, shall have power "to cross, intersect, join or unite its railroad with any other railroad before constructed, at any point on its route and upon the ground of such other railroad corporation, with the necessary turnouts, sidings, switches and other conveniences in furtherance of the objects of its connection."

"Sec. 34. Every railroad corporation shall start and run its cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all passengers and property which shall be offered for transportation at the place of starting, within a reasonable time previously thereto, and at the junctions of other railroads, and at the usual stopping places established for receiving and discharging way passengers and freight for that train; and shall take, transport and discharge such passengers and property at, from and to, such places, on due payment of the fare or freight legally authorized therefor.

"Sec. 35. Every railroad corporation whose road, at or near the same place, connects with or is intersected by two or more railroads competing for its business, shall fairly and impartially afford to each of such connecting or intersecting roads equal terms of accommodation, privileges and facilities in the transportation of cars, passengers, baggage and freight over and upon its roads, and over and upon their roads, and equal facilities in the interchange and use of passenger, baggage, freight and other cars required to accommodate the business of each road, and in furnishing passage tickets to passengers who may desire to make a continuous trip over any part of its roads and either of such connecting roads. The board of railroad commissioners may, upon application of the corporation owning or operating either of the connecting or intersecting roads, and upon fourteen days' notice to the corporation owning or operating the other road, prescribe such regulations as will secure, in their judgment, the enjoyment of equal privileges, accommodations and facilities to such connecting or intersecting roads as may be required to accommodate the business of each road, and the terms and conditions upon which the same shall be afforded to each road. The decision of the commissioners shall be binding on the parties for two years, and the supreme court shall have power to compel the performance thereof by attachment, mandamus, or otherwise."

It will be observed that each of these provisions of the statute, to which reference has been made, expressly refers to



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every railroad corporation, and thereby includes every railroad incorporated under the provisions of section 2 of the act.

The contention is now made that to compel a track connection with steam railroads by electric or street surface railroads for the interchanging of traffic would be a burden and a hardship to steam railroads that was not contemplated when the statute was passed; that to permit connections with steam railroads by the large number of electric railroads which have been, or are being, constructed, would result in confusion to the steam railroads, and make their operation difficult. The learned appellate division appears to have been impressed with this argument, for it states in its opinion that the proceeding and purpose is new, and obviously opens a field of inquiry of the greatest importance, not alone to railroad corporations, but to the general public, which has an interest in the streets and highways of towns, villages, and cities of the state; that, if the street surface railways are to be recognized as an integral part of the great system of steam railroads, the purpose should be made clear by the legislature. We readily concede that the legislative intent should clearly appear, but we are not much impressed with the contention that burden and hardship will result to the steam railroads, or that confusion will follow in their operation. The provisions of the statute authorizing the courts to compel connections or intersections of tracks between railroads, to our minds, was intended to promote the public interests independent of that of the railroad companies. Travelers and the shippers of merchandise and freight have the right to make use of all of the facilities provided for in the articles of incorporation, and the provisions of the statute pertaining thereto, in the conduct of their business. This, we think, is made clear by the provisions of the statute, which requires that all railroad corporations whose roads are, or shall be, intersected shall receive from each other and forward to their destination all goods, merchandise, and other property intended for points on their respective roads, with the same dispatch and at the rate of freight not exceeding the local tariff rate, etc. Bearing this purpose in mind, we pass to a consideration of the meaning of the law. As we have seen, by the statute authorizing the incorporation of railroads, the legislature contemplated making provisions for all kinds of railroads, street surface as well as steam railroads. By section 4, subdivision 7, all roads organized under the provisions of the act were empowered "to take and convey persons and property on its railroad by the power or force of steam, or animals, or by any mechanical power." It is true that the statute contains numerous provisions which apply alone to steam railroads, and other provisions which apply alone to electric or street surface roads; but in most of these provisions there is specific reference to either steam or street surface roads. The great body of the statute was intended to apply to all railroads incorporated



under its provisions, especially so far as those provisions were applicable. The revision of the railroad law of 1850 is of recent date, and after the street surface railroads in our cities and villages had become very numerous. The legislature, in undertaking a revision of the railroad laws, attempted, so far as possible, to establish a complete system, under which all kinds of railroads could be operated, and the public interest subserved. In construing these statutes, it does not become us to shut our eyes to the purposes sought to be accomplished, or the discoveries that have been made, and the improvements accomplished, in the transportations of the country in recent years. The great steam roads have extended across the continent from ocean to ocean, and from the far north down to the tropics. These roads have become great arteries, over which is transported the greater part of the commerce of the continent. It has not been considered profitable or practical for steam roads to be constructed to every village, hamlet, or productive district in the country. This, however, is rapidly being accomplished by the numerous electric roads that are in process of construction, or are contemplated. By their means the farmer, the mill owner, and the merchandise vendor in distant places may be able to reach the steam railroads, and through them the great markets of our cities, with their merchandise and products, and in this way one road may become a feeder and distributor of the other.

If one electric road were seeking a connection with another road operated by the same power, it would hardly be claimed that the provisions of section 12 did not apply. It is practically conceded that electric roads may be united with other roads of the same character, and operated by the same power. But the statute has not limited the courts to the requiring of intersections and connections between roads of the same character. Very likely, electric roads tendering cars to steam roads for transportation should only offer those properly equipped with brakes and couplers, so that they may be taken and transported readily and safely. It may be that additional regulations will become necessary in order that equal privileges, accommodations, and facilities may be afforded in connecting and intersecting roads, but all this may be controlled by the board of railroad commissioners, who, under the provisions of section 35, to which we have referred, is given full authority in the premises. It is said that the rights of the public in the streets and highways of our cities, towns, and villages should be protected, and that cars loaded with merchandise and freight should not be permitted to be run over street surface railroads. It may be that additional regulations should be provided, either by statute or by ordinance, limiting the time in which cars of this character should be permitted to run over street surface railroads, especially in cities and large villages; but that the power exists to run such cars is no longer an open question in this court. This question was

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elaborately considered in the case of *De Grauw v. Railway Co.*, 43 App. Div. 502, 60 N. Y. Supp. 163, which case was affirmed in this court on the opinion below. 163 N. Y. 597, 57 N. E. 1108.

Again, bearing in mind the legislative purpose, its intent to our minds appears reasonably clear by the provision, "to cross, intersect, join or unite its railroad with any other railroad." The word "cross" is used in connection with the word "connect," and the legislature could hardly have intended that one word should mean one kind of a railroad, and the other another kind. One of the most important rights which the legislature undertook to provide for and to protect was that of the right of one railroad to cross the tracks of another which had previously been constructed. Were it not for this, one road running north and south through the state could absolutely prevent the constructing of another extending east and west. The legislature was careful to make ample provisions for crossings in the same section in which intersections were provided for, and these provisions with reference to crossings have been held to apply to electric and street surface roads crossing steam roads, or to steam roads crossing electric or street surface roads. *Buffalo, B. & L. Ry. Co. v. New York, L. E. & W. R. Co.*, 72 Hun, 583, 25 N. Y. Supp. 265; *Port Richmond & P. P. Electric R. Co. v. Staten Island Rapid Transit R. Co.*, 71 Hun, 179, 24 N. Y. Supp. 566, affirmed in 144 N. Y. 445, 39 N. E. 392. It appears to us that the legislature has clearly empowered the court to order connections such as is sought by the petitioner in these proceedings. The order of the appellate division should therefore be reversed, and that of the special term affirmed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, VANN, CULLEN, and WERNER, JJ., concur.

Order reversed, etc.

**DENISON & S. RY. CO. v. RAILROAD COMMISSION OF TEXAS.**

*(Supreme Court of Texas, June 27, 1902.)*

[69 S. W. Rep. 62.]

**State Railroad Commission—Question of Jurisdiction—Decision—Refusal to Act—Finality.**

The question as to the jurisdiction of the state railroad commission over a railroad where the company engaged in its construction applies to the commission for the consent of that body to issue bonds in advance of its completion, being committed to the commission by Sayles' Ann. Civ. St. arts. 4352, 4584f, and Rev. St. arts. 642, subd. 21 and Id. art. 4580, without any provision by which the supreme court can revise its action, its decision is final and conclusive.

Motion by the Denison & Sherman Railway Company for leave to file a petition for mandamus against the railroad commission of Texas. Motion overruled.

Head & Dillard, for applicant.

**BROWN, J.** The motion for leave to file a petition for a writ of mandamus against the railroad commission of Texas is hereby overruled. The allegations of the petition show that the applicant owns and operates a line of railroad extending between the cities of Sherman and Denison, a length of about eight miles, and into each city, running upon the streets of each to the extent of about five miles. It is engaged in carrying passengers in the cars which are operated within the limits of each city and upon the line between the two cities. It does not carry freight upon its railroad, either between those cities or within their limits. The corporation applied to the railroad commission of Texas for authority to issue stock and bonds, presenting all facts necessary under the statute to justify the issuing of such stock and bonds, but the railroad commission refused to take jurisdiction of the application, whereupon the motion now under consideration was filed in this court. The petition accompanies the motion, and contains the prayer that upon final hearing a peremptory writ of mandamus may be issued to the railroad commission, commanding it to entertain jurisdiction of the application to issue bonds, and to pass upon and determine the right of the applicant to do so. Article 4584f, Sayles' Ann. Civ. St., contains this provision: "Should any company or corporation authorized to construct or operate a railroad in this state desire to issue bonds or other indebtedness, to be secured by lien or other mortgage on its franchise or property in advance of the completion of said railroad, it shall make application to and first procure the consent of the railroad commission thereto." That article prescribes the manner of proceeding before the commission to obtain the consent of that body to the issuance of the bonds. Article 4580 of the Revised Statutes, so far as applicable to this question, reads as follows: "The terms 'road,' 'railroad,' 'railroad companies,' and 'railroad corporations,' as used herein, shall be taken to mean and embrace all corporations, \* \* \* that may now or hereafter own, operate, manage or control any railroad, or part of railroad in this state, and all such corporations \* \* \* as shall do the business of common carriers on any railroad in this state." Subdivision 1: "The provisions of this chapter shall be construed to apply to, and affect only the transportation of passengers, freight and cars between points within this state, provided this chapter shall not apply to street railways nor suburban or belt lines of railways in or near cities and towns." Article 4352, Sayles' Ann. Civ. St., prescribes the requisites of the articles of incorporation for railroads, and subdivision 2 of that article contains the following: "Provided, however, that local suburban railways may be constructed for any distance less than ten miles from the corporate limits of any city or town, in addition to such mileage as they may have within the same." Subdivision 21 of article 642 of the Revised Statutes, as amended by the act of 1897, is in this

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language: "For the constructing, acquiring and maintaining and operating street railways and suburban belt lines of railways within and near cities and towns for the transportation of freight or passengers, which may also construct, own and operate union depots, \* \* \* provided that all street or suburban railways engaged in transporting freight shall be subject to the control of the railroad commission." It is apparent that the first thing for the commission to determine was its jurisdiction over applicant's railroad. That question is by the law committed to the commission without any provision by which this court can revise its action. Its decision is final and conclusive, which would preclude this court from issuing the writ of mandamus prayed for, if, indeed, there might be a case in which such writ could be issued by this court to that body.

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## GULF &amp; S. I. R. CO. v. TOWN OF SEMINARY.

(*Supreme Court of Mississippi, Nov. 17, 1902.*)

[32 So. Rep. 953.]

## Towns—Use of Name—Right of Action.

A town cannot maintain a suit against a railroad for giving its name to a station near it, any cause of action for the inconvenience and confusion arising therefrom belonging to passengers and shippers.

Appeal from chancery court, Hinds county; H. C. Conn, Chancellor.

"To be officially reported."

Suit by the town of Seminary against the Gulf & Ship Island Railroad Company. A demurrer to the bill was overruled, and defendant appeals. Reversed.

Appellee filed this bill in this case against appellant in the chancery court of Hinds county, in which it alleged that it was a municipal corporation under the laws of the state of Mississippi, under the name "Seminary"; that it had been such for a number of years; that appellant established a depot about a half mile north of said town of Seminary, and named it "Seminary," and that defendant sold tickets to travelers to Seminary, and put off those desiring to stop at Seminary (complainant) at this station, and that goods bought by merchants to be shipped to said town of Seminary were put off by defendant at the station, to the great annoyance and damage of the town of Seminary and the people generally. The bill prayed for an injunction restraining the defendant company from designating and applying the name of "Seminary" to any other town along its line than complainant.

McWillie & Thompson, for appellant.

Watkins & Easterling, for appellee.

TERRAL, J. That the Gulf & Ship Island Railroad Com-

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pany should have established on its line of road two stations named "Seminary" is shameful; but what legal concern this is to the town of Seminary, we fail to perceive. The injury complained of is that a person desiring to visit the town of Seminary is sold a ticket to Seminary, and is put off at the station of that name which is a half mile north of the Seminary which is in its immediate vicinity, and thereby such person suffers inconvenience and loss in getting to the town of Seminary. A second injury is alleged to be that, when a merchant in the town of Seminary contracts with the railroad company for the shipment of goods to him, such goods are put off at the Seminary station most distant from him, to his inconvenience and loss. That these are actionable grievances to the merchant and traveler injured thereby, we are strongly inclined to believe; but how does either of these wrongs constitute a legal wrong to the town of Seminary, as a public political corporation of the state of Mississippi? If appellant should call its depot here in the city of Jackson by the name of "Seminary," and thus have three depots of that name on its line of road, such conduct would be highly injurious to all persons affected thereby; but what power conferred upon the town of Seminary gives it the right of action in such case? A right of action lies only in favor of a person who is injured and suffers loss by the act complained of. Facilities of travel and of commerce are greatly useful, and wrongful obstructions of either may be grounds of action, but of action only by those whose legal rights are infringed, and who suffer loss therefrom. The appellee mistakes the fact when it supposes that the name "Seminary" designates itself, and can legally only designate itself, in such sense as that nothing else can legally bear that name. In truth, its name is not "Seminary," but "The Town of Seminary." It gets its name, as well as its powers, from its incorporation as the "Town of Seminary." It acquired no civil right from its previous incorporation as the "Village of Seminary," or from its old incorporation as a school under the name of "Zion Seminary." Whatever rights a municipality of its grade may have under our Code it has, and no others. That the Gulf & Ship Island Railroad should have frequent and convenient stations along the line of its road is a necessity of its business; that these stations should be named, and named by itself, is equally certain; and that the stations should be named to facilitate, rather than confuse, the public dealing with it, seems to us highly important. But the town of Seminary, as a legal person created by law, has only the power conferred upon it by law, and none known to us can authorize it to bring suits for the grievances set out in this bill. The grievances set out are not grievances of the town of Seminary as a political corporation. The rights invaded are not rights of the municipality. The bill is not maintainable.

Reversed and remanded.



**BAN v. COLUMBIA SOUTHERN RY. CO. et al.***(Circuit Court of Appeals, Ninth Circuit, May 5, 1902.)*

[117 Fed. Rep. 21.]

**Jurisdiction of Federal Courts—Diversity of Citizenship—Suit by Assignee.**

A federal court is without jurisdiction of a suit on a cause of action existing in favor of a partnership, brought by one partner in his own right and as assignee of the interest of his copartner, unless the bill shows that the citizenship of the assignor is such that the suit might have been maintained in that court by the firm.

**Same—Jurisdictional Averments—Necessary Parties.**

Plaintiff and another contracted as partners to do certain work in the construction of a railroad as subcontractors. By a contract between themselves, previously made and known to the principal contractor, it was agreed that plaintiff should furnish the materials and do the work, and receive and disburse the money received therefor, accounting to his associate only for a share of the net profits of the contract. After the completion of the work plaintiff brought suit in a federal court to enforce a mechanic's lien, filed in the name of the partnership, for the balance due therefor under the contract, alleging such facts in his bill and that no net profits were earned under the contract: *held*, that it was competent for plaintiff to allege, for jurisdictional purposes, the contract between him and his nominal partner, and that under such agreement the citizenship of such partner did not affect the jurisdiction of the court, since he had no interest in the recovery and was neither an indispensable nor necessary party.

**Mechanics' Liens—Construction of Statute—"Structures."**

The mechanic's lien law of Oregon of 1885 (Laws 1885, p. 13), which gives a lien for labor performed upon or material furnished to be used in the construction of "any building, wharf, bridge, ditch, flume, tunnel, fence, machinery, or aqueduct, or any other structure or superstructure," under the rule of construction applied to it by the supreme court of the state, includes a railway by the term "other structure."

**Same—Oregon Statutes—Application to Railroads.**

Under the rule that repeals by implication are not favored, and that two statutes on the same subject shall stand together, and both be given effect, if practicable or possible, the general mechanic's lien law of Oregon (Laws 1885, p. 13), as applied to railroads, was not repealed by implication by the special act of February 25, 1889 (Laws 1889, p. 75), which gives liens to a class of creditors not embraced within the terms of the general act, as well as to the same class, and provides a different method of procedure for their enforcement, but both statutes may be sustained as giving to the latter class a cumulative remedy as against railroads.

**Same—Property Affected—Right to Enforce against Railroad Extension.**

Under the mechanic's lien law of Oregon a subcontractor who performs work in building an extension of a railroad may claim and enforce a lien therefor upon such extension only, and the fact that he does not include in his claim the entire road of the company does not violate any public policy of the state, nor give the company any ground to object to his claim.

**Appeal from the Circuit Court of the United States for the District of Oregon.**

For opinion below, see 109 Fed. 499.

The portions of the amended bill of complaint, referred to in the opinion of the court, are substantially as follows:



“That the defendant the Columbia Southern Railway Company now is, and at all times hereinafter mentioned was, a private corporation, incorporated and existing under and by virtue of the laws of the state of Oregon; that the defendant the New York Security & Trust Company now is, and at all times hereinafter mentioned was, a private corporation, incorporated and existing under and by virtue of the laws of the state of New York; that complainant now is, and at all times hereinafter mentioned was, a citizen of the empire of Japan and a subject of the emperor of said empire; that the amount in controversy between the complainant and defendants exceeds the sum of two thousand dollars (\$2,000), exclusive of costs and interest; that defendants the Columbia Southern Railway Company, A. E. Hammond, and Archie Mason, and each and all of them, are citizens of the state of Oregon: that the defendant the New York Security & Trust Company is a citizen of the state of New York”; that the defendant the Columbia Southern Railway Company is the owner of that certain piece or parcel of land, together with all appurtenances thereto and structures thereon, known as the right of way of said Columbia Southern Railway Company, and being in the counties of Wasco and Sherman, in the state of Oregon (the same being particularly designated, and described in the amended bill); that about the ——— day of ———, 1899, the Columbia Southern Railway Company entered into a contract with the defendant A. E. Hammond for the construction of an extension of its railway from the town of Moro to Shaniko, to be constructed and built on said right of way; that on the 11th day of October, 1899, the said A. E. Hammond entered into a contract with the defendant Archie Mason for the construction of all grading, bridging, culverts, ditches, change of creek channels, track-laying, surfacing, and such other work connected therewith; that thereafter, on the 30th day of October, 1899, the defendant Archie Mason sublet to the complainant and one N. G. Seaman the track laying and surfacing of said railway; that the defendant A. E. Hammond was the original contractor in charge of the construction of said railway; that the defendant Archie Mason was a subcontractor under defendant Hammond, and as such was the agent of the defendant the Columbia Southern Railway Company for the construction of said portion of said railway; that about the ——— day of ———, 1899, the complainant and Seaman commenced to perform the work and labor provided for and required to be performed in and by the said contract, and continued to perform work and labor in the construction of said railway thereafter until on or about the 10th day of July, 1900, at which time complainant and Seaman fully completed the work provided for and agreed to be done by them, and they then ceased to perform work and labor under said contract; that said complainant and said Seaman between the 30th day of October, 1899, and the 10th day

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of July, 1900, duly performed all the terms and conditions of the said contract between them and the said Archie Mason, and on said last-named date the work provided for by the terms of said contract was fully completed; that the agreed and reasonable prices and value of the work and labor performed was and is the full sum of \$32,365.86, of which said sum there had been paid in cash the sum of \$7,000, leaving a balance of \$25,365.86 due and owing from said defendant Archie Mason on account of work and labor performed in the construction of said railway; that after the completion of said contract as aforesaid, and within 30 days after said complainant and said Seaman ceased to perform work and labor in the construction of said road, and within 30 days after the completion of said railway, to wit, on the 8th day of August, 1900, said plaintiff and Seaman prepared and filed with the county clerk of Sherman county, in the state of Oregon, a claim containing a true statement of their account and demand against the said defendant Archie Mason, after deducting all just credits and offsets and alleging facts showing that the law as to the filing of such a lien had been fully complied with; that said complainant and said Seaman, in order to perform and complete the work specified in their said contract with said defendant Archie Mason, among other things did the following particular kind and amount of work [here follows a specification of the laying and surfacing of 46 miles of track and itemized accounts of the extra work done and the amounts due therefor]; that although said complainant and said Seaman repeatedly requested said defendant Archie Mason and the chief engineer of said railway company to measure and estimate the work done by them as required by the terms of said contract as hereinabove specified, yet said defendant Mason and said chief engineer refused and neglected, and have ever since refused and neglected, so to do, and have wholly disregarded their duty in that regard; that said defendant Mason and said engineer still refuse and neglect to comply with the terms and provisions of said contract; that a reasonable time within which to make and determine the final estimate of the entire work done by said complainant and said Seaman under said contract has long since elapsed; that said refusal, neglect, and failure of said chief engineer and his assistants was fraudulent and in bad faith, and in willful violation of the terms and conditions of said contract, and was collusively contrived with said defendants; that defendant the New York Security & Trust Company has or claims to have some lien or incumbrance upon or interest in the property hereinabove described, but complainant alleges that such interest, if any, is subordinate and inferior to the claim and lien of this complainant; that prior to entering into said contract, a copy of which is attached hereto, marked 'Exhibit A,' for track-laying and surfacing of said railway, with said Archie Mason, said complainant and said Seaman entered into

an agreement by the terms of which, among other things, it was mutually agreed and understood that the said complainant, S. Ban, should furnish all labor and advance all money required to perform the work provided for and contracted to be done under said contract, and in consideration thereof should receive and disburse all money belonging to said partnership, and, when said work should be finally completed and settled for, should render to said Seaman a statement of all money received and disbursed, and pay over to him one-half of the net profits of said work; that said defendant Mason had due notice and knowledge of said agreement at the time he entered into said contract with complainant and said Seaman; that there are and will be no profits arising from said work or contract, and there will be no profits or money to be turned over to said Seaman; that heretofore, and since the filing of said mechanic's lien, and prior to the commencement of this suit, the said N. G. Seaman for value relinquished and transferred to complainant all his right, title, and interest in and to said mechanic's lien, and in and to the claim and demand against said defendant Mason, on account of the work and labor performed under said contract, as hereinabove set forth, and this complainant ever since has been, and now is, the sole owner and holder of said mechanic's lien, and of said claim and demand against said Columbia Southern Railway Company, said A. E. Hammond, and said Archie Mason."

Section 1 of the act of 1885, giving liens to mechanics, laborers, and others, reads as follows:

"Section 1. Every mechanic, artisan, machinist, builder, contractor, lumber merchant, laborer and other person performing labor upon or furnishing material of any kind to be used in the construction, alteration or repair, either in whole or part, of any building, wharf, bridge, ditch, flume, tunnel, fence, machinery, or aqueduct, or any other structure or superstructure, shall have a lien upon the same, for the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owner of the building, or other improvement, or his agent, and every contractor, subcontractor, architect, builder, or other person, having charge of the construction, alteration or repair, in whole or in part, of any building, or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this act." Laws Or. 1885, p. 13.

Section 1 of the act of 1889 reads as follows:

"Section 1. That any and all person or persons who shall hereafter as subcontractor, materialman or laborer furnish to any contractor to any railroad corporation any fuel, ties, materials, supplies or other article or thing, or who shall do or perform any work or labor for such contractor in conformity with any terms of any contract, express or implied, which said contractor may have made with any such railroad corporation, shall have a lien upon all property, real, personal

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and mixed, of said railroad corporation: provided, such subcontractor, materialman or laborer shall have complied with the provisions of this act." Laws 1889, p. 75.

The appellant's assignment of errors is as follows:

"(1) That the court erred in holding that the lien upon railroads given under the general mechanic's lien law of the state of Oregon was repealed by implication by the act of the legislature of the state of Oregon approved February 25, 1889; (2) that the court erred in holding that the complainant, S. Ban, had no lien upon the railroad of the defendant Columbia Southern Railway Company for the money furnished by and the labor performed by him as stated in the complaint; (3) that the court erred in holding that the complainant's lien is or would be subsequent to and inferior to the lien of the defendant New York Security & Trust Company; (4) that the court erred in holding that the amended bill of complaint did not state facts sufficient to entitle the complainant to the equitable relief prayed for; (5) that the court erred in holding that the court was without jurisdiction to entertain the suit brought as alleged in the amended bill of complaint by the complainant, Ban, as assignee in part of Seaman; (6) the court erred in sustaining the demurrer to the amended bill and dismissing the amended bill of complaint; (7) that there is manifest error in this, to wit, in dismissing the bill for lack of equity, for the reasons as given in the opinion, or at all; (8) there is manifest error in this, to wit, in awarding to the defendants the Columbia Southern Railway Company and A. E. Hammond, or either of them, their costs and disbursements."

The contention of appellees is that the decree of the lower court dismissing the bill of complaint can be justified on four grounds:

"(1) The lower court had no jurisdiction. (2) The Oregon mechanic's lien act of 1885 does not authorize a mechanic's lien on a railway. (3) If the act of 1885 ever did authorize a mechanic's lien on a railway, it has been impliedly repealed by the railway lien act of 1889. (4) The effort of appellant is to secure a mechanic's lien on a portion only of the railway line of the Columbia Southern Railway Company."

A. C. Emmons and Williams, Wood & Linthicum, for appellant.

Snow & McCamant, for appellees.

Before GILBERT, Circuit Judge, and HAWLEY and DE HAVEN, District Judges.

HAWLEY, District Judge, after stating the foregoing facts, delivered the opinion of the court.

This is a suit to foreclose a mechanic's lien upon an extension of a line of railroad from Moro, Sherman county, Or., to Shaniko, Wasco county, Or., belonging to the Columbia Southern Railway Company, defendant herein. The record

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shows that a demurrer to the original bill of complaint, which was filed by complainant, Ban, was sustained by the court upon the ground that the statute of Oregon, which it was claimed authorized a lien for work and labor done was repealed by implication by a subsequent statute approved February 25, 1889. It was also held that Seaman, who was interested with Ban, should have been made a party complainant in the suit. Complainant thereafter filed an amended bill of complaint, to which the railway company and the defendant Hammond interposed a demurrer upon the ground that "it affirmatively appears from the complainant's bill that there is no equity therein, and the complainant is not entitled upon the facts alleged to the equitable relief prayed for, or any relief." This demurrer was also sustained by the court. The amended bill was dismissed, and judgment rendered in favor of defendants for their costs. From this judgment the appeal herein is taken. The material portions of the amended bill are set forth in the foregoing statement of facts, as are certain portions of the mechanic's lien laws of 1885 and 1889, and also the assignment of errors on behalf of appellant and the points relied on by appellees to sustain the judgment of the court below.

1. Did the court, under the facts stated, have any jurisdiction of this case? Section 629, Rev. St., among other things, provides:

"No circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the contents, if no assignment had been made."

The object and intent of this restriction as to suits brought by assignees were evidently to prevent and prohibit the making of assignments of choses in action for the purpose of giving jurisdiction to the national courts. The language of this statute must be interpreted by the purpose to be effected and the mischief to be prevented. In *Bushnell v. Kennedy*, 9 Wall. 387, 391, 19 L. Ed. 736, the court, speaking of the eleventh section of the judiciary act, said:

"The denial of jurisdiction of suits by assignees has never been taken in an absolutely literal sense. It has been held that suits upon notes payable to a particular individual or to bearer may be maintained by the holder, without any allegation of citizenship of the original payee, though it is not to be doubted that the holder's title to the note could only be derived through transfer or assignment. *Bullard v. Bell*, 1 Mason, 259, Fed. Cas. No. 2,121; *Bank of Kentucky v. Wister*, 2 Pet. 321, 7 L. Ed. 437. So, too, it has been decided, where the assignment was by will, that the restriction is not applicable to the representative of the decedent. *Chappedelaine v. Dechenaux*, 4 Cranch, 308, 2 L. Ed. 629. And it has also been determined that the assignee of a chose in action may



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maintain a suit in the circuit court to recover possession of the specific thing, or damages for its wrongful caption or detention, though the court would have no jurisdiction of the suit if brought by the assignors. *Deshler v. Dodge*, 16 How. 631, 14 L. Ed. 1084."

This line of exceptions illustrates the general character of cases to which the statute would not be applicable.

In *Shoecraft v. Bloxham*, 124 U. S. 730, 735, 8 Sup. Ct. 686, 31 L. Ed. 574, the court held that a suit to enforce the performance of a contract is a suit to recover the contents of a chose in action, within the meaning of section 629 of the Revised Statutes, and in the course of the opinion the court said:

"The terms used, 'the contents of any promissory note or other chose in action,' were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. They were not happily chosen to convey this meaning, but they have received a construction substantially to that purport in repeated decisions of this court. They were so construed in the recent case of *Corbin v. Black Hawk Co.*, 105 U. S. 659, 26 L. Ed. 1136, where the subject is fully considered and the decisions cited. There a suit brought to enforce the specific performance of a contract was held to be a suit to recover the contents of a chose in action, and therefore not maintainable, under the statute in question, in the circuit court of the United States, by an assignee, if it could not have been prosecuted there by the assignors, had no assignment been made."

We agree with the court below that:

"Unless Seaman's citizenship was such as to entitle him to bring this suit, Ban, as his assignee, cannot maintain it. If, without the assignment, in an action brought by Seaman and Ban, the court would have been without jurisdiction, it is equally without it when the action is brought by Ban in his own right under the contract and as the assignee of Seaman." In other words, complainant, Ban, under the provisions of the statute cannot rely upon any rights under the assignment from Seaman in so far as the question of jurisdiction is concerned. But the question whether Ban, upon the facts alleged in the amended bill, can maintain the suit in his own name without the assignment from Seaman, presents other questions for our consideration. Upon the facts of the agreement with Mason the rights of Ban and Seaman were the same. They were equally interested in the contract and equally responsible under it, and if that condition existed at the time of the commencement of the suit Ban would not be able to maintain the suit in his own name. Seaman would be not only a necessary, but an indispensable, party complainant. It is, however, claimed that the agreement between Ban and Seaman was made prior to the contract with Mason and of which Mason had knowledge.



This shows that at the time of the commencement of this suit Seaman had no interest whatever in the matter in controversy; that Seaman's interest, at best, was only in the profits; that there were no profits, and would be none if Ban should succeed and recover the entire amounts sued for.

The crucial test on this branch of the case depends upon the question whether, upon the facts stated in the amended bill Seaman was an indispensable party to the suit. The general principles relied upon by appellees are that a complainant seeking equity must bring before the court all such parties as are necessary to enable it to do complete justice, and that he should so far bind the rights of all parties interested in the suit as to render the performance of the decree which he seeks safe to the party called upon to perform it by preventing his being sued or molested again respecting the same matter, either at law or in equity. 1 Daniell, Ch. Prac. 192; 1 Bates, Fed. Eq. Proc. §§ 39, 40. These general principles are well settled, and furnish more or less aid in determining whether or not any of the indispensable parties to the suit have been omitted. If Seaman is not an indispensable party, he need not be made a party complainant herein; but, if he is an indispensable party, he must be brought in, wherever he may reside, and, if bringing him in deprives the court of its jurisdiction, complainant must abide by the consequences.

In *Barney v. City of Baltimore*, 6 Wall. 281, 284, 18 L. Ed. 825, the court, in discussing the subject of parties to suits in chancery, formal, necessary, or indispensable, said:

"There is a third class, whose interests in the subject-matter of the suit and in the relief sought are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction."

The court also quotes with approval the language of the court in *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158, where, speaking of this third class, the court said:

"Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

The authorities upon this point are quite numerous. See *Ribon v. Railroad Co.*, 16 Wall. 450, 21 L. Ed. 367; *Williams v. Bankhead*, 19 Wall. 571, 22 L. Ed. 184; *Kendig v. Dean*, 97 U. S. 425, 24 L. Ed. 1061; *Hicklin v. Marco*, 6 C. C. A. 10, 56 Fed. 549, 553.

The question then arises whether or not the suit can be tried, heard, and determined without the presence of Seaman. He has no interest whatever in the suit. Mason, who

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sublet the contract to Ban and Seaman, knew that Seaman's interest was conditional upon profits being received. Ban was to do the work, receive and disburse the money, and, if there were any profits, Seaman was to have one-half thereof. There are no profits. Why, then, is it necessary to make Seaman a party complainant herein, when the only effect his presence would have would be to defeat the jurisdiction of the court? It affirmatively appears from the averments in the amended bill that none of the parties to the suit could possibly be injuriously or prejudicially affected by having the suit maintained by Ban, who is the real party in interest, as complainant herein. The whole subject-matter of the suit could be determined without Seaman being brought in, and settled with justice to all parties concerned without detriment or prejudice to either.

Complainant had the right to allege the facts showing the relations which Seaman had with the subject-matter of the suit, that he had no interest therein, and was not an indispensable party thereto. If brought in, he would only be a nominal party. The jurisdiction of the court can be maintained upon the general principles announced in *Holmes v. Goldsmith*, 147 U. S. 150, 161, 13 Sup. Ct. 288, 37 L. Ed. 118, where the suit was based upon a note executed by M. B. Holmes, John Dillard, and R. Phipps, citizens of Oregon, payable to the order of W. F. Owens, a citizen of Oregon, and by him indorsed to L. Goldsmith and Max Goldsmith, citizens of the state of New York. Suit was brought in the United States circuit court in the district of Oregon by the Goldsmiths against Holmes, Dillard, and Phipps; it being averred in the petition that the defendants executed the note for the accommodation of Owens to enable him to procure a loan thereon; that Owens was in fact the maker of the note, and never had any cause of action thereon against the defendants. The court held that upon the question of jurisdiction it was permissible to show by parol testimony what relation the parties really held to the contract sought to be enforced; that the spirit and purpose of the restrictive clause in the statute were to prevent the making of assignments of choses in action for the purpose of giving jurisdiction to the federal court, where such jurisdiction would not exist as between the original parties to the contract, and finally, after quoting many decisions, the court said:

"We think that the jurisdiction of the circuit court in the case before us was properly put by the court below upon the proposition that the true meaning of the restriction in question was not disturbed by permitting the plaintiffs to show that, notwithstanding the terms of the note, the payee was really a maker or original promisor, and did not, by his indorsement, assign or transfer any right of action held by him against the accommodation makers."

See, also, Equity Rule 47; *Payne v. Hook*, 7 Wall. 425,

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431, 19 L. Ed. 260; Wachusett Nat. Bank v. Sioux City Stove Works (C. C.) 56 Fed. 321; Insurance Co. v. Svendsen (C. C.) 74 Fed. 346, 348; Smith v. Lee (C. C.) 77 Fed. 779; Sioux City Terminal R. & Warehouse Co. v. Trust Co. of North America, 27 C. C. A. 73, 82 Fed. 124.

In *Baxter v. Hart*, 104 Cal. 344, 345, 37 Pac. 941, the action was brought to recover \$391.39 for services performed by plaintiff in threshing wheat and barley for defendant. The testimony tended to show that plaintiff Baxter and one Flanigan owned a threshing machine and were engaged as partners in threshing grain for farmers. Flanigan and defendant were also partners in the crop of grain threshed. Flanigan arranged with defendant for the threshing, and each of them was to pay separately for one-half of the threshing. But Baxter and Flanigan then agreed that they would not thresh the crop as copartners, but that the pay coming from defendant should all go to plaintiff, and that Flanigan's grain should be threshed for him free to offset the other half. It did not appear that this arrangement between plaintiffs was known to defendant until after the grain was threshed. Upon these facts the court said:

"The only question in the case is, does the testimony support the finding that defendant is indebted to plaintiff in the sum of \$391.93 for the threshing of defendant's crop of wheat and barley, etc.? No reason is perceived why plaintiff and Flanigan could not, as between themselves, although copartners, agree that, as to a given venture or contract, plaintiff should have the entire benefit, as they might have assigned the demand arising therefrom one to the other after completion of such venture or contract. Had defendant presented a counterclaim against the firm held by him before notice of this arrangement, it would have been valid to defeat the claim; but, in the absence of such a cross-demand, it is not perceived that he can be injured by a judgment for that which he was bound to pay. The case, then, stands thus: Plaintiff and Flanigan entered into a contract jointly with defendant, and then by an agreement between themselves stipulated that plaintiff should be the recipient of the entire benefit thereof. This constituted him the real party in interest as between himself and his copartner, and as a result he was the proper and only proper party plaintiff."

Ban and Seaman were not copartners in the full sense of that term. A partner must ordinarily bear the burden of the losses, as well as share in the profits. The authorities cited by appellees, as to the obligations of parties jointly interested or as copartners, have no controlling effect when applied, or sought to be applied, to the particular facts of this case.

2. Did the court below err in holding that the mechanic's lien law of 1885 was repealed by implication by the lien law of 1889? This is not free from difficulty. Much can be said, and has been ably said, on both sides of the controversy. The

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act of 1889 contains provisions with reference to the enforcement of the liens under it which are radically different from the procedure under the act of 1885. The suit is brought under the provisions of the act of 1885. If the act of 1889 is given controlling effect, complainant is "out of court" upon his own statement of facts, or lack of statement of material facts. He must stand or fall upon the provisions of the act of 1885. The title of the act of 1885 is, "An act for securing liens for mechanics, laborers, materialmen, and others and prescribing the manner of their enforcement." Laws 1885, p. 13. The title of the act of 1889 is, "To protect contractors, subcontractors, and laborers in their claims against railroad companies or corporations, contractors, or subcontractors." Laws 1889, p. 75. The act of 1885 provides:

"Sec. 3. A lien created by this act upon any parcel of land shall be preferred to any lien, mortgage, or other incumbrance which may have attached to said land subsequent to the time when the building or other improvement was commenced."

Complainant asks for a priority of his lien over that of the New York Trust Company, defendant herein. The act of 1899 provides:

"Section 1. That no such lien shall take priority over existing lien."

The act of 1885 provides:

"Sec. 10. No payment by the owner of the building or structure to any original or subcontractor, made before thirty days from the completion of the building, shall be valid for the purpose of defeating or discharging any lien created by this act in favor of any workman, laborer, lumber merchant or materialman, unless such payment so made by the owner of the building or structure to such original or subcontractor has been distributed among such workmen, laborers, lumber merchants or materialmen, or, if distributed in part only, then the same shall be valid only to the extent the same has been so distributed."

This enables a lien claimant under certain conditions to collect the whole amount from the owner regardless of what has been paid by it. The act of 1889 contains a proviso (section 1) that:

"The aggregate of all liens hereby authorized shall not in any case exceed the price agreed upon in the original contract to be paid by such corporation to the original contractor, nor shall such corporation be liable for any greater sum than the amount then actually due by such corporation to said original contractor."

The complaint in this case is silent upon the question whether there is anything due from the railway company to Hammond or to Mason. There are other differences in the acts that need not be specially noticed. The closing section of the act of 1889 says:

"Inasmuch as there is now no law upon this subject, and it

is of importance to laborers and materialmen, this act shall take effect from and after its approval by the governor."

What did the legislature mean when it said "there is now no law upon this subject"? It is the contention of appellees that the act of 1885 does not authorize any mechanic's lien on railroads, and that section 7 of the act of 1889 is a legislative declaration that there was no law in Oregon providing for any liens on railroads, and that, if the act of 1885 "might by any possibility be construed to provide for a lien on railways," then it is conclusive evidence of the legislative intention that the act of 1889 should operate as a repeal of the act of 1885. In 2 Jones, Liens, § 1624, the author says:

"Under the general terms 'structure,' 'erection,' or 'improvement,' it is, of course, possible to establish a lien for almost anything that can be attached to the realty. \* \* \* Under such a statute, a lien has been established against a railroad for ties furnished the company (Neilson v. Railroad Co., 44 Iowa, 71), and doubtless a lien might be established for almost any part of a railroad, such, for instance, as the grading of the line of road as an 'improvement' upon land."

In the consideration of the questions herein involved we must naturally look, at least in the first instance, to the decisions of the supreme court of Oregon, if there are any, touching the construction of the statutes of that state, for they would be binding upon this court.

In *Forbes v. Electric Co.*, 19 Or. 61, 23 Pac. 670, 20 Am. St. Rep. 793, which was a suit to enforce a number of liens for labor under a contract which one Stronach had with the corporation to dig holes and place the poles therein, and stretch the necessary wires on the same, from the city of Portland to a point near Oregon City. The said wires were to be used by the defendant corporation for the purpose of transmitting light and power from the company's works at the falls of the Willamette river to the city of Portland and for other electrical purposes. The plaintiff rested his claim to enforce his lien on the fact that Stronach had a contract with the defendant corporation to do the work which they performed, and that he employed each of said parties at a fixed rate of wages per day to assist in its performance. The court said:

"The plaintiff's right to the remedy which he seeks must depend on the statute. \* \* \* The principal question litigated on this appeal is whether or not this statute gives a lien for labor against the property described in the complaint; in other words, do these poles, planted in the ground, connected together by wires and insulators, constitute a structure within the true intent and meaning of this statute? In answering this question, but little aid can be had from the decisions of other states, for the reason that no general principle of law is involved, and such decisions have generally

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turned upon the special or peculiar phraseology of the particular state. Without attempting to indulge in any refined distinctions or definitions, and having in view the object and purpose of the enactment in question, I think it may properly be held that the poles, wires, insulators, etc., mentioned in the complaint, constitute a structure within the meaning of the statute, and that the same is subject to a lien for labor performed thereon."

It is true that this case is not identical with the case in hand. The lien given is not upon a railroad; but from the principles stated by the court it necessarily follows that if the posts and wireways, therein referred to, are "structures," within the meaning of that word as used in the statute, a railroad would also be included.

In *Giant Power Co. v. Oregon Pac. R. Co.* (C. C.) 42 Fed. 470, 8 L. R. A. 700, the direct question was presented to Judge Deady, and he held that the words "any other structure," as found in the act of 1885, did apply to railroads. His opinion is instructive, and covers several other points directly applicable to the present case. He declared that the act of 1889 was a most extraordinary one, and pointed out the fact that by its provisions the lien of the materialman or laborer is declared to exist against all the property of the railroad corporation, "real, personal, and mixed," without any limit as to situation or place of existence on furnishing of materials for the performance of labor without any record being made of the same, or notice to any one of the claim, except in the case of a laborer, when notice is required to be given to the corporation that he will hold its property for his "pay." That case, like this, was presented upon demurrer, and there, as here, it was contended by counsel for the demurrer that the passage of Act 1889, § 7, amounts to a legislative declaration that the act of 1885 did not include or apply to railroads. In the course of his opinion Judge Deady said:

"The subsequent act might have been passed out of abundance of caution, and not upon any well-grounded or serious impression that the former was wanting or insufficient in this respect. Be this as it may, the opinion of the legislative assembly of 1889 as to the scope and purpose of the act of 1885 is of very little moment, and can have no weight in the construction of the later one concerning rights and transactions which were vested or transpired before its existence. The intention of the legislature of 1889 in passing the act of that year is a proper subject of judicial inquiry and determination; but its opinion of the scope and effect of the act of 1885, if it had any, is not material in this case. Considering the peculiar provisions of the act of 1889, the most obvious reason for its passage is that the legislature thereby intended to take the subject of claims against railway corporations for materials and labor furnished out of the operation of the general lien law of 1885 and put it under this special act, which



does not require any notice of the claim to be filed with any clerk or other officer, and provides a special proceeding in which all such claims must be enforced as in one suit. It must be admitted that, if the legislature intended to include railways in the act of 1885, it is not apparent why so important a subject was not mentioned in the long list of those expressly named. Still the language of the act is certainly broad and comprehensive enough to include a railway. It is certainly a 'structure,' if not a 'superstructure.' A lien can as conveniently be imposed upon it as upon a 'ditch,' 'flume,' or 'tunnel.' These instances of lienable property are expressly mentioned in the statute; and the scope and operation of this general term, 'structure,' immediately following this specific enumeration, must be ascertained by reference to the latter. The doctrine of 'noscitur a sociis' applies; and the significance of word 'structure,' in this statute, is indicated by the company it is found in,—'ditch,' 'flume,' and 'tunnel.' If the language of the act was 'building or other structure' only, then it might not be construed as including railway. But the words, a 'ditch or any other structure,' cannot, consistently with this established rule of construction, be held to exclude a railway. A railway is literally and technically a 'structure.' It consists of the bed or foundation, which may be of earth, stone, or trestle work, on which are laid the ties and rails. These, taken together, constitute a 'structure,' in the full sense of the word,—a something joined together, built, constructed."

He then refers to the opinion of the supreme court in *Forbes v. Electric Co.*, supra, and adds:

"A railway is certainly a structure within the authority of this decision. The railway and the wireway, notwithstanding the different uses to which they are subject, are both structures, upon which a lien may be had as security for the labor and materials that entered into their composition."

We think the decision in the supreme court of Oregon, above quoted, in principle, at least, is decisive upon the question under consideration, and, supplemented as it is by the opinion of Judge Deady, will be treated as conclusive. In connection with these decisions we call especial attention to *Pennsylvania Steel Co. v. J. E. Potts Salt & Lumber Co.*, 11 C. C. A. 11, 63 Fed. 11, 14, where the court held that no lien attached upon a railroad under the language of the lien law of Michigan. It is very instructive, and may be examined with profit, as to the necessity of courts in their respective states being governed by the language of the statute giving a lien. The views therein expressed are unquestionably sound, and are certainly as favorable to appellant as to the appellees herein.

Returning to the main question whether the statute of 1885 is repealed by the act of 1889, we find certain well-settled canons of interpretation applicable to this question that

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should not be overlooked: (1) The law does not favor repeals by implication. (2) The legislative intent should, when ascertained, be given controlling effect. (3) When there is a difference in the whole purview of two statutes relating to the same subject, the former is not repealed. (4) Statutes which are not inconsistent with one another and which relate to the same subject-matter are in *pari materia* and must be construed together, effect being given to all, though they contain no reference to one another and were passed at different times. (5) That two statutes on the same subject shall stand together, and both be given effect, if practicable or possible. (6) A statute ought never to be held to repeal by implication another previous statute on the same subject, unless the terms of the two statutes are so repugnant that that they cannot be reconciled or stand together.

In *Wood v. U. S.*, 16 Pet. 342, 362, 10 L. Ed. 987, the court, having under consideration the question whether the sixty-sixth section of the act of 1799 (1 Stat. 677), has been repealed or remains in full force, said:

"That it has not been expressly or by direct terms repealed is admitted; and the question resolves itself into the more narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication; for it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy."

In *Chicago, M. & St. P. R. Co. v. U. S.*, 127 U. S. 406, 408, 8 Sup. Ct. 1194, 32 L. Ed. 180, it was contended that there was no statute in force which authorized deductions from compensation claimed by railroads during a certain period, and in replying thereto the court said:

"There is a brief and conclusive answer to this contention. Section 3962 of the Revised Statutes is not repealed by section 5 of the act of 1879. 20 Stat. 358. Section 3962 authorizes a deduction from the pay of contractors, whether they be natural persons or corporations, of the price of the trip in all cases where the trip is not performed, and not exceeding three times the price if the failure be caused by the fault of the contractor or carrier. Section 5 of the act of 1879 applies only to railroad companies, and has special reference to failures of delivery within schedule time, and makes a difference between them and failures to make the trips, leaving the provision for the latter substantially as it is in the Revised Statutes. When there are two acts or provisions of law relating to the same subject, effect is to be given to both, if that be practicable. If the two are repugnant, the latter will operate as a repeal of the former to the extent of the repugnancy. But the second act will not operate as such repeal merely because it may re-

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peat some of the provisions of the first one, and omit others, or add new provisions. In such cases the later act will operate as a repeal only where it plainly appears that it was intended as a substitute for the first act. As Mr. Justice Story says, it 'may be merely affirmative, or cumulative, or auxiliary.' "

In *Winters v. George*, 21 Or. 251, 257, 27 Pac. 1041, the court held that the act of the legislature providing for the consolidation of the cities of Portland and Albina did not repeal and was not in conflict with the Muessdorffer act, which provided for the maintenance by those cities of bridges across the Willamette river, and in the course of its opinion said:

"It is elementary law that repeals by implication are not favored. It is a reasonable presumption that the legislature did not intend to keep really contradictory enactments in the statute book, or to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention. Hence it is said to be a rule, founded in reason as well as in abundant authority, that in order to give an act not covering the entire ground of an earlier one, nor clearly intended as a substitute for it, the effect of repealing it, the implication of an intention to repeal must necessarily flow from the language used, disclosing a repugnancy between its provisions and the earlier law, so positive as to be irreconcilable by any fair, strict, or liberal construction which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving at the same time the force of the earlier law, and construing both together in harmony with the whole course of legislation on the subject."

In *Raudebaugh v. Shelley*, 6 Ohio St. 316, the court said:

"The maxim, '*Leges posteriores priores contrarias abrogant*,' does not apply except where the inconsistency or repugnancy is such that the two provisions cannot stand as cumulative or concurrent rules of action, so that the later statute by its necessary operation abrogates the former. Repeals by implication are not favored, especially under our present constitution; and it is a well-settled rule of construction, applicable to all remedial laws, that where a new remedy or mode of proceeding is authorized, without an express repeal of a former one relating to the same matter, it is to be regarded as merely cumulative, creating a concurrent remedy, and not as abrogating the former mode of procedure."

See, also, *McLaughlin v. Hoover*, 1 Or. 31, 33; *Bower v. Holladay*, 18 Or. 491, 496, 22 Pac. 553; *Mount v. Mitchell*, 31 N. Y. 356, 360; *Goddard v. City of Boston*, 20 Pick. 407, 410; *Harford v. U. S.*, 8 Cranch, 45, 3 L. Ed. 504; *Ex parte Yerger*, 8 Wall. 85, 105, 19 L. Ed. 332; *State v. Stoll*, 17 Wall. 425, 431, 21 L. Ed. 650.

These cases sufficiently illustrate the general principles we

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have announced. In the present case it will be observed by a careful reading of section 1 of the act of 1885, set out at length in the statement of facts, that it only applies to persons performing labor upon or furnishing material "to be used in the construction, alteration or repair" of the building, ditch, flume, or other structure. This is the sole object and purview of the whole section. Then, turning to section 1 of the act of 1889, it will be discovered, upon careful inspection, that it has a different object in view. It first gives to persons who, as subcontractors, materialmen, or laborers, furnish to any contractor or to any railroad corporation "any fuel, ties, material, supplies, or article or thing," and then provides that any laborer, for any work or labor performed for such contractor, shall also have a lien upon "all property, real, personal and mixed, of said railroad corporation." Is it not evident from a comparison of these acts that it was the intent of the legislature of 1889 to give a lien to persons who were not included in the provisions of the act of 1885? We think it was. Such a conclusion gives sense and meaning to section 7 of the act, wherein the legislature said, "as there is now no law upon the subject." No repeal was necessary. There was no intention on the part of the legislature of 1889 to repeal by implication or otherwise the act of 1885. Any other view would convict the legislature of an absurdity. The fact of the different methods of procedure contained in the two acts also furnish evidence in support of this view; for it might be, within the wisdom of the legislature, that it thought such differences would be just and proper to fairly meet the justice of the case; and it certainly was not unreasonable for the legislature to make different provisions as to the character of the lien which the supply men and laborers were given under the act of 1889 from those specified in the act of 1885 with reference to the subcontractors and others "having charge of the construction, alteration or repair of a railroad." This makes both acts perfect in themselves and amounts to a complete system which different persons might enforce under the law, which gives them a lien, whether it be the general act of 1885 or the special act of 1889.

In *Robinson v. Rippey*, 111 Ind. 112, 12 N. E. 141, the court had under consideration the question whether the gravel road law of March 3, 1877, was repealed by implication by the act of April 8, 1885. The court, in the course of its opinion, said:

"There are very material differences in the provisions of the two acts. In many respects they are inconsistent, while in others they are substantially the same. Each act, taken in itself, constitutes a complete scheme or system for the construction of gravel roads and for the method of procedure in making and collecting assessments. The question presented is a very perplexing one, but, after the most careful study we have been able to give it, we have reached the conclusion

that it was the intention of the legislature to create two systems, and not to repeal the former law. The fact that both of the statutes are directed to the attainment of the same end does not warrant the conclusion that the later repeals the former. Statutes constructing two systems for the government of the same subject may both stand. *Beals v. Hale*, 4 How. 37, 11 L. Ed. 865; *Wood v. U. S.*, 16 Pet. 342, 363, 10 L. Ed. 987; *Daviess v. Fairbairn*, 3 How. 636, 11 L. Ed. 760; *Randebaugh v. Shelley*, 6 Ohio St. 307. Mr. Bishop thus states the rule: 'Two or more separate laws may establish the same right, or provide redress for the same wrong; and the person seeking to enforce the right or avenge the wrong may proceed on the law he chooses.' *Bish. Written Laws*, § 163d. In the legislation upon the subject of drainage we have an example of the creation of two distinct schemes for the attainment of the same end, and these statutes have been sustained and enforced. \* \* \* There is, therefore, no intrinsic difficulty in maintaining the theory that two systems were created by the legislature, and the fact that the statutes relate to the same subject and seek the same end does not necessarily require it to be held that the later supersedes the earlier. It does not follow that, because two statutes contain similar provisions, the earlier is abrogated; for, if the intention to construct two systems is manifested, the similarity in the provisions of the two statutes will not supply a valid reason for declaring the earlier to be repealed by implication. The principle which controls this phase of the question was decided in *Powers v. Shepard*, 48 N. Y. 540. \* \* \* It was there held that 'the re-enactment of certain of the sections of one act in a subsequent one providing for a different scheme is not a repeal by implication of those sections in the first act.' \* \* \* It may, perhaps, be true that confusion will result from framing two systems for the government of one subject, and that it is an unwise exercise of power; but the wisdom or expediency of a statute is a question for the legislature, and not for the court. *Eastman v. State*, 109 Ind. 278, 10 N. E. 97, 58 Am. Rep. 400. The courts can do no more than determine the validity of the statute, and, having adjudged it valid, ascertain and enforce the legislative intention. They cannot, as Judge Cooley says, 'run a race of expediency with the legislature.' Nor will mere inconvenience, worked by the similarity of two statutes, justify the courts in declaring that the earlier is impliedly repealed by the later. *Waldo v. Bell*, 13 La. Ann. 329; *Mitchell v. Duncan*, 7 Fla. 13; *Randebaugh v. Shelley*, supra; *State v. Berry*, 12 Iowa, 58; *Wilson v. Shorick*, 21 Iowa, 332. The addition to an existing system does not necessarily imply its abrogation."

3. Can a lien be secured upon an extended line of railroad upon which the work was done without including the entire railroad owned by the defendant corporation? In a certain sense it may be said that there is endless confusion upon this



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subject. Some of the authorities are diametrically opposed to others. Many of the cases are based upon the particular language of the state statutes; some upon the grounds of public policy supposed to exist in certain states against giving a lien upon different sections of a railroad, that the railroad is an entirety, and that there can be no severance or dislocation of the road as a unit. There is a direct conflict upon the main question involved herein. In Missouri it has been expressly held that under the provisions of the statutes of that state a lien for labor and materials cannot be enforced against that portion or section of a railroad only for which they were furnished. To be enforceable the lien must be against the whole railroad situated in that state. *Knapp v. Railway Co.*, 74 Mo. 374, 378; *Id.*, 6 Mo. App. 205. In 2 *Jones, Liens*, § 1619, it is said:

“Where a part only of a railroad lies within the state under the laws of which the lien is enforced, the lien cannot, of course, be enforced against that part of the road not within the state; but it must be enforced against the whole of that part within the state, and not against a section or portion of it only.”

The only authorities cited in support of this text are from Missouri. We are not aware of any general public policy existing in Oregon which forbids the enforcement of a lien given by the statute of that state against the property of a railroad or other corporation. If a railroad company gives a mortgage upon certain portions of its road, it can be enforced by law in a foreclosure suit without embracing the whole road, subject, of course, to the general principles that in such foreclosure suits the property mortgaged cannot, for obvious reasons, be sold in separate parcels or portions and made subject to the right of redemption as given by the statutes of the state where the property is situated. We are of opinion that these general principles apply with equal force to mechanics' and other liens given by the statute of the state wherein the property is situated. We know of no sensible reason why any different principle should be applied in one case and not applied in the other. True it is that the mortgage is given by the free and voluntary act of the corporation, while the lien of a subcontractor or laborer is filed by virtue of the statute; but this distinction does not, in our opinion, demand the application of any different principle.

Conceding, for the purposes of this opinion, that the lien claimant might have filed his lien against the whole railroad as a unit, it does not necessarily follow that he must enforce his lien against that portion only upon which he performed his work. Can the corporation complain because he took his lien upon less than he was entitled to? If so, upon what grounds? In several of the states the statute gives a lien on buildings and so much land around the same as may be convenient or necessary for its use or occupation. Others provide for a



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specified quantity of land. Suppose the lien claimant only filed his lien on the building and the ground upon which it stood; would the lien claimant lose the right to enforce his lien because he did not include all the land to which he was entitled under the law? He could not, of course, take his lien on the roof of the house, nor of the parlor or kitchen. These could not be separated from the main building. Such comparisons, made for the purpose of showing that the lien cannot be taken except on the whole road, beg the real question at issue. It will be time enough to consider illustrations of this character when a lien claimant seeks to enforce his lien upon detached sections of that portion of the road upon which the work was done. We must not lose sight of the facts of this case. The defendant corporation had completed its railroad from Biggs to Moro. This part of the road was completed and in full operation prior to the time when the contracts were entered into for the extension of the road from Moro to Shaniko. Appellees contend that the lien should have been upon the whole railroad owned by the defendant from Biggs to Shaniko. There is no segregation of any part of the road on which the work was done. That portion is not divided into sections. The lien in this case is upon the whole railroad to which it applies.

*Brooks v. Railroad Co.*, 101 U. S. 443, 25 L. Ed. 1057, cited by appellees, is not in opposition to the views above expressed. There it was held that where a contractor performs labor and furnishes material upon a section or division of a railroad in Iowa then in the process of construction, and there was a pre-existing and duly recorded mortgage executed by the company upon its entire line of road to secure its bonds, the lienholder, on filing his claim within the time and in the mode prescribed by the statute, has, as against the mortgagees, a paramount lien upon the entire road. The assignments of error were that the court erred in decreeing a lien on the property in Davis, Van Buren, and Lee counties, the first division of the road, for work done in Appanoose county, the next division, on a contract which was dated and work begun after recording the mortgage in the latter county. The court said:

"As we understand this objection, it is founded on the idea that while, if the whole road had been uninterruptedly built under one contract, the lien of the contractors and subcontractors would have been good against the whole road, though they had contributed only to the building of a limited portion of it, yet because these subcontractors were only employed on one division of the road, after another had been finished, and under a distinct contract with the company made after that completion, the lien can only attach to the last section of the road, and even this is subordinate to the mortgage of the appellants. One branch of the question here raised was very fully considered in the case of *Neilson v. Railway Co.*, 44 Iowa, 71. That was a case where, after the building of a railroad had been commenced, a mortgage was executed on its

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whole line, both where work had been done and where none had been done. After this the building of the road was continued under new contracts by persons who did work on the other parts of the road, and the question was whether they had any lien prior to that of the mortgage, and, if so, whether it extended to all the road, or only to that part built under the new contracts. The court, after mature deliberation, decided both these questions in favor of the contractors."

The most that can be claimed for this case is that it holds that a lien could be claimed for the whole road. It does not intimate that it could not be claimed only for the portion upon which the lien claimants performed the work; nor does this case destroy the force of the opinion in *Canal Co. v. Gordon*, 6 Wall. 561, 18 L. Ed. 894, in favor of the views contended for by appellant. It says:

"In that case, as was said in the opinion, we had no aid from any decision of the courts of the state. In the one before us we have several decisions of the Iowa court. \* \* \* If *Canal Co. v. Gordon*, supra, is at variance with the decisions of the courts of Iowa construing her own statutes, we must follow the latter."

Judge Deady, in *Giant Power Co. v. Oregon Pac. R. Co.*, discusses the question herein involved at some length. Among other things, he said:

"It is easy to say a thing is against public policy, but that does not make it so. Public policy is manifested by public acts, legislative and judicial, and not private opinion, however eminent. I have no knowledge of any such public policy prevailing in this state. A railway is nothing but private property devoted to public use, the same as a warehouse, and is so far, and no further, the subject of public policy. The owner, be he a natural person or a private corporation, can disuse or dispose of it, in whole or in part, at his or its pleasure. \* \* \* But there is a public policy of this state, as shown by its legislation, that should be considered in this connection, which is that persons who furnish labor or materials to be used in the construction of railways shall have a lien thereon as a security for the value of such labor and materials. To promote this policy, and to produce the practical results intended by the legislature, the statute giving this lien should be construed as far as in reason and right it may, and all mere doubts as to the extent and manner of its application should be so resolved."

In *Purtell v. Bolt Co.*, 74 Wis. 132, 135, 42 N. W. 265, the court, after citing many of the Wisconsin cases, said:

"But there is no public policy prevailing in this state against enforcing a laborer's lien upon any bridge or other structure of a railroad company for work performed thereon, no matter whether such structure is or is not part and parcel of the railway, or to what extent the enforcement of a lien thereon may interfere with or impede the operation of the railway or the exercise by the company of its corporate fran-

chises. On the contrary, the public policy of this state is to enforce such a lien, and the company operates its railway and uses its franchises subject to the obligation to pay the claim of the lienor as established by the judgment. All this was settled by this court in *Hill v. Railroad Co.*, 11 Wis. 214, and the rules there established were not abrogated or shaken by the judgment in *Wilkinson v. Hoffman*, 61 Wis. 637, 21 N. W. 816, and have not been disturbed by any other adjudication of this court."

In *Railway Co. v. Wilcox*, 122 Ind. 84, 94, 23 N. E. 506, it was contended that the lien claimant could only claim his lien upon that portion of the road which was confined to one county, but the court held that "the lien fastens upon an entire and continuous line of unfinished road, and may be enforced in any of the counties through which the road runs." The opinion, like the one in hand, is quite lengthy, and its reasoning is based on the statute of that state which gives "a lien upon a railroad not in operation, and in doing this makes explicit what was before clearly implied." In that case the railroad was completed from Anderson to Noblesville, and no further, so that there was an uncompleted part extending from Noblesville to the line of Hamilton county, and on that part the lien fastened. In the course of the opinion the court, among many other things, said:

"The purpose of the statute is evident, and that purpose is to give laborers, contractors, and materialmen a lien upon the railroad which their labor constructs and for which their property is used. The legislature, it is manifest, did not intend to confine the lien to a line of road within a single county, and we cannot so construe the statute. \* \* \* It is our duty to give effect to the intention of the legislature, and this we do by adjudging that a lien fastens upon an entire and continuous line of unfinished road, and may be enforced in any one of the counties through which the road runs.

\* \* \* Where a corporation, having a line of railroad in operation to a town or city within a county, contracts for the construction of a part of the road leading from such town or city to a point beyond the county limits, the contractors may acquire a lien upon the part which they construct, or aid in constructing, although a portion of it lies within the county in which a part of the road is completed and in operation."

If the rule of public policy prevents a lien being filed, except on the whole road, finished as well as the unfinished portions thereof, then the statute which gives a lien on the uncompleted portion on which the work was done, upon the reasoning of some of the cases relied upon by appellees, would be unconstitutional because against public policy. No act authorized by the constitution can be said to be against the public policy of the state. *State v. Preble*, 18 Neb. 251, 2 Pac. 754.

In *Creer v. Canal Co.*, 38 Pac. 653, the supreme court of



Idaho held that a party constructing a branch or section of a main canal, or performing labor thereon in its construction, under a contract with the owner, is entitled to a lien upon such branch or section for any balance due him for such labor. In the course of the opinion the court said:

"The appellants claim that, if the plaintiffs had asked a lien upon the whole system of canals, they might have obtained it; complaining that the plaintiffs did not ask of the court all they were entitled to, and therefore they should not have a lien upon any part of the canal. The appellants demand that the case should be reversed because the plaintiffs did not claim all they should have. The appellants can hardly be heard in such a complaint. \* \* \* All the work for which plaintiffs claim this lien was done on these branches, and under a contract to construct these branches, which does not mention the main canal. This had been theretofore constructed. We think this lien can be obtained on this part of the system."

In *Canal Co. v. Gordon*, supra, it was urged that the decree of the lower court was erroneous, because the lien given by it extended the entire length of the canal, instead of limiting it to the upper section, where all the work was done. The court said:

"Is this objection well taken? Liens of this kind were unknown in the common law and equity jurisprudence both of England and of this country. They were clearly defined and regulated in the civil law. Domat, Civil Law, §§ 1742, 1744. Where they exist in this country they are the creatures of local legislation. They are governed in everything by the statutes under which they arise. These statutes vary widely in different states. Hence we have found no adjudication in any other state which throws any light upon the question before us, and there has been none in California. We are therefore compelled to meet the case as one of the first impression. We have already shown that the upper and lower sections were distinct works in several essential particulars, to which we need not again advert. The lower one having been finished and in use before the upper one was contracted for, if those having a lien upon the former had insisted that it became extended over the latter as soon as the latter was completed, no legal mind, we apprehend, could have doubted that the claim could not be sustained. If it could, Gordon's lien might have been rendered valueless. We think the converse of this proposition applies with equal force. If a lien upon the lower section could not have been extended over the upper one, upon what principle can it be maintained that Gordon's lien embraced the lower section? A lateral feeder, constructed and intersecting the main line after it was completed, would certainly not be subject to a previous lien upon the main line, if such a lien existed. We can see no substantial difference between that case and the one before us.

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The upper section was only an additional feeder. That it was an elongation of the main line, and not a lateral work, does not affect the principle involved. The controlling circumstances and the object in both cases would be the same.

\* \* \* The work of Gordon was all done upon the upper section. He had nothing to do with the lower section. So far as he was concerned, and for all the purposes of this litigation, they were distinct and independent works. A different principle would produce confusion and lead to serious evils."

We have given this case unusual care, thought, and attention. In the examination and discussion of the several points many diverse views have been encountered. The authorities in many instances have been allowed "to speak for themselves." It has been the aim of the court to accept those which were deemed to be founded upon solid ground and based upon the better reason. The result of all our investigations leads us to the conclusion that the court erred in sustaining the demurrer to the amended bill of complaint and entering judgment of dismissal thereon.

The judgment appealed from is reversed, with costs, and the cause remanded. The court below will fix a reasonable time within which defendants may plead or answer.

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PHILLIPS v. POSTAL TEL. CABLE CO.

(*Supreme Court of North Carolina, June 13, 1902.*)

[41 S. E. Rep. 1022.]

**Eminent Domain—Unlawful Appropriation of Right of Way by Telegraph Company—Effect of Awarding Damages.**

A judgment awarding permanent damages to a landowner for the unauthorized appropriation by a telegraph company of a right of way confers the same rights on the company as a condemnation of the way.

**Same—Same—Failure to Compensate—Due Process of Law.**

An appropriation of a right of way by a telegraph company without giving compensation therefor is in violation of Const. U. S. Amend. 14, providing that no one shall be deprived of property without due process of law, though not of Id. Amend. 5, prohibiting the taking of property without due compensation, as the latter provision only applies to the federal government.

**Same—Same—Effect of Right to Use Military and Post Roads.**

Act Cong. July 24, 1866, providing that telegraph companies accepting the act which relates to the construction of telegraph lines over the United States shall have the right to construct telegraph lines over the public domain and over military and post roads of the United States, does not authorize such companies to appropriate private lands for their right of way.

**Use of Railroad Right of Way for Telegraph Purposes—Additional Servitude—Compensation.**

The fact that a railroad has a right of way over lands which it does not use, and that a telegraph company whose line is not beneficial to the railroad condemns a telegraph right of way thereover in proceedings against the railroad company, does not entitle the telegraph company to use such right of way without compensating the land-

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owner over whose land the railroad right of way extends, but it is an additional burden on the fee, entitling such landowner to compensation.

**Same—Same—Parties.**

Under Code, § 2010, providing that, in condemnation proceedings by a telegraph company to obtain a right of way along a railroad right of way, it is sufficient to give jurisdiction if the corporation owning the easement is made a party defendant, but that only the interest of the parties before the court shall be condemned in such proceedings, the owner of the fee, who is not a party to such proceedings, is not affected by a judgment of condemnation against the railroad company.

**Same—Unlawful Appropriation—Damages—Remedies.**

The owner of land over which a telegraph right of way is appropriated without authority is not required to proceed under Code, c. 49, relative to telegraph companies, and the condemnation of rights of way by such companies, for the collection of damages therefor, but may bring action against the company, as sections 2010 and 2011 thereof only authorize the company to institute proceedings thereunder, and provide proceedings therefor, and section 2012 thereof only relates to subsequent proceedings.

**Same—Same—Same—Rights of Subsequent Purchaser of Land.**

The fact that plaintiff in an action against a telegraph company for damages for maintaining a line over his land without authority so to do has purchased the land after the original unlawful entry by the company does not defeat his right to maintain such action.

**Same—Same—Permanent Damages—Statute.\***

Permanent damages are recoverable, under the general law, against a telegraph company, for the unlawful appropriation without compensation of a right of way over plaintiff's land, but not under Acts 1895, c. 224, authorizing the recovery of permanent damages for unlawfully appropriating a right of way; the latter section being expressly limited to railroads.

**Excessive Verdict.**

The refusal of the trial court to set aside a verdict giving damages for the unlawful appropriation of a telegraph right of way over plaintiff's lands, as being excessive, cannot be reviewed on appeal.

Montgomery, J., dissenting.

Appeal from superior court, Davidson county; Brown, Judge.

Action of trespass by H. T. Phillips against the Postal Telegraph Cable Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action in the nature of trespass to recover damages caused by the appropriation by the defendant of a part of the plaintiff's land for the purpose of erecting and maintaining a telegraph line. The following are the material parts of the complaint and answer:

The complaint alleges the incorporation of the defendant, and the plaintiff's ownership of the land. It then proceeds as follows: "(3) That the defendant has caused to be placed in and upon said land, and extending across the same the length of a mile or more, a row of posts, and has sunk anchor wires

\*As to the damages recoverable for the use of a railroad right of way for a telegraph line, see foot-note appended to *Postal Tel. Cable Co. of Montana v. Oregon Short Line R. Co.* (C. C.), 3 R. R. R. 432, 26 Am. & Eng. R. Cas., N. S., 432.



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from some of the posts into the ground, and has strung wires over and across the said premises, and unlawfully and wrongfully continue to keep up and maintain the said posts and wires, going upon and over said lands to attend to the same, and have thereby taken and appropriated plaintiff's said lands to its own use; the said posts and wires are an obstruction to the plaintiff in the cultivation and use of his farm, interfering with the use of machinery thereon, and constitute a continual nuisance to plaintiff; and that plaintiff has been and will be damaged by the maintenance of said posts and wires, and the appropriation of his lands therefor, in the sum of eight hundred dollars."

The answer denies each and every material allegation in plaintiff's complaint, and, for further answer, says: "(1) The said defendant is a telegraph company chartered and organized under the laws of the state of New York; that it has, prior to the acts complained of by plaintiff in his complaint in said cause, accepted the provisions of an act of congress entitled 'An act to aid in the construction of telegraph lines, and to secure to the government the uses of the same for postal, military and other purposes,' approved July 24, 1866 (sections 5263-5268, Rev. St.), and by virtue of said act, and section 3964 of the Revised Statutes, and of the laws of the state of North Carolina, and its charter, it had the right to construct, maintain, and operate its telegraph line along and upon the right of way of the Southern Railway through the state of North Carolina; that the defendant is an interstate telegraph company, and all its lines in the state of North Carolina are engaged in interstate commerce, by their connection with other lines of said company extending to and through all the states of this union, and the principal towns and cities therein, and cable lines extending across the Atlantic Ocean, into the principal cities of all the nations of the earth, and all of its lines in said county of Davidson are upon the said railway right of way. (2) Defendant says that all the holes dug in the ground, and the posts planted therein, as well as the anchor wires sunk in the ground and connecting with said posts, which are complained of by the plaintiff in the third cause of action of his complaint filed in this cause, were dug, and said posts planted, and anchor wires sunk, etc., upon the right of way of the Southern Railway Company, for a public use, and said right of way, under the statutes of this state, was acquired for the public use. Defendant denies that the construction and maintenance of any of the poles and wires upon the lands claimed by the plaintiff in his said complaint at all interferes with his lawful right to the use of said lands, and denies that the construction and maintenance of said telegraph line was and is unlawful and a nuisance, and that plaintiff has been or will be damaged thereby in the sum of eight hundred dollars, or any sum whatever. (3) Defendant says the lands claimed by plaintiff in the third cause of action of his com-

plaint, upon which it constructed its telegraph poles and strung its wires and planted its anchors, are a part and parcel of the right of way of the Southern Railway Company, which, by virtue of section 3964 of the Revised Statutes of the United States, is a post road, and by authority of sections 5263-5268, Rev. St., it had the right to construct its lines thereon, and that said telegraph poles, wires, and guy wires were constructed thereon by the consent of the said Southern Railway Company, and by the payment of just compensation to the Southern Railway Company. (4) For further plea, the defendant says: If the posts and guy wires which plaintiff, in third cause of his said complaint, says were placed and are extending across his lands for the length of a mile or more, with wires strung thereon, are upon the lands of the plaintiff, as alleged in said third cause of action, plaintiff is entitled to receive in this action the actual cash value of the land actually occupied by said poles and guy wires, and nothing more, as damages for the construction and maintenance of said telegraph line thereon."

By permission of the court, defendant filed the following amendment to its answer: "And before the construction of the said telegraph line along and upon the said right of way, defendant company procured such right of way by regular condemnation proceedings instituted in the superior court of the county of Guilford, state of North Carolina, which proceedings were removed by the defendant, the said Southern Railway Company, from said court into the circuit court of the United States for the Western district of the state of North Carolina, and by virtue and authority of the orders, judgments, and decrees of said court the right of said defendant telegraph company to condemn so much of the right of way of the said Southern Railway Company was adjudged,—to construct, maintain, and operate its telegraph line along and upon the right of way of the said Southern Railway Company from Charlotte, North Carolina, to the state line between the states of North Carolina and Virginia, where said right of way crosses the same, and from the city of Greensboro, in said county of Guilford, to the city of Raleigh, in said state, and from said city of Greensboro to the city of Winston, in said state, which includes the lands along and upon the right of way of said Southern Railway Company in the county of Davidson, claimed by plaintiff in his declaration as his property. And on the 20th and 21st days of April, 1900, by authority of said court, damages were duly assessed by commissioners appointed by said court, to the said Southern Railway Company, for such right and privilege, whose award was reported to said court, and filed in the office of the clerk of said court, on the said 21st day of April, 1900, to which award no exceptions were filed by the said Southern Railway Company within the time authorized by the statutes of the state of North Carolina, in conduct of said proceedings, for the fil-

ing of the same, and at the time of filing the same the said defendant company paid into the office of the clerk of said court for the said railway company the amount of said award, together with the costs in said cause."

The following judgment was rendered: "This cause coming on to be heard upon the facts admitted in the pleadings and upon the facts admitted by counsel upon the trial, and hereto annexed, and the jury having found the issue as follows: 'What permanent damages does plaintiff's land sustain by reason of the existence of defendant's telegraph line across said land within the right of way of the railroad company? Answer. \$190,'—it is adjudged that plaintiff recover of defendant the sum of one hundred and ninety dollars, together with costs of action."

The following facts were admitted by the parties to the action: "That the land described in the complaint is the land of plaintiff, subject to the rights and titles of the North Carolina Railway Company by virtue of the charter (Laws N. C. 1848-49, c. 82), and its lessee, the Southern Railway Company, and that plaintiff acquired his title by deed in May, 1900, which deed covers the land described in the complaint; that on January, 1900, the defendant company constructed a telegraph line across said land within and upon the right of way of the said North Carolina Railway Company, by placing 31 or 32 poles thereon, with telegraph wires overhead thereon; that so far as the said North Carolina Railroad Company and its lessee, the Southern Railway Company, are concerned, defendant company acquired by condemnation proceedings under the statutes of North Carolina (Code, c. 49) the right to construct its telegraph line along and upon the right of way of the said North Carolina Railway Company and its lessee, the Southern Railway Company, but that neither plaintiff, nor those under whom he holds, were parties to the said condemnation proceedings; that the said telegraph line was constructed with and by the consent of the Southern Railway Company; that the Southern Railway Company is the lessee of the North Carolina Railway Company to the entire right of way property and franchise of said railroad in Davidson county, which lease was made and entered into on the ——— day of ———, 18—, for a period of 99 years, which lease is properly recorded in the office of the register of deeds for Davidson county; that the North Carolina Railway Company was chartered under the laws of North Carolina (Laws 1848-49, c. 82), which act is hereby made a part of this case on appeal; that the defendant company is a corporation duly incorporated under the laws of the state of New York, with authority to construct its telegraph line through the United States, including the state of North Carolina, and along and upon the way of the Southern Railway Company; that the defendant company had, prior to the construction of its line upon the right of way of the Southern Railway Company through Davidson county,

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duly accepted the provisions of an act of congress entitled 'An act to aid in the construction of telegraph and secure to the government the use of the same for postal, military and other purposes,' approved July 24, 1866."

F. H. Busbee and J. R. McIntosh, for appellant.

E. E. Raper, for appellee.

DOUGLAS, J. (after stating the case). The sole purpose of this action is to recover compensation for the appropriation of the plaintiff's property by the defendant under the color of eminent domain. The plaintiff does not seek to eject the defendant, nor to interfere in the slightest degree with the fullest enjoyment of the easement it claims. He does not threaten or intend to annoy the defendant by a multiplicity of suits, but, on the contrary, he asks the court, in the exercise of its equitable jurisdiction, to award him such permanent damages as will compensate him for the appropriation of the easement. This being done, the defendant ceases to be a trespasser, and will thereafter remain in the lawful enjoyment of the easement thus acquired. There is therefore no question as to whether the defendant shall have the easement, but simply whether it shall pay for it. There is no pretense that the plaintiff or any former owner of the land has received any compensation whatever, or that any agreement, or attempt to agree, with such owner, was ever made by the defendant, as required by sections 1943 and 2010 of the Code. It is so well settled that private property cannot be taken, directly or indirectly, even for a public purpose, without just compensation, that it seems a work of supererogation even to restate the principle. *Railroad Co. v. Davis*, 19 N. C. 451; *State v. Glen*, 52 N. C. 321; *Cornelius v. Glen*, Id. 512; *Johnston v. Rankin*, 70 N. C. 550; *Staton v. Railroad Co.*, 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838. In *Johnston v. Rankin*, supra, this court says on page 555: "Notwithstanding there is no clause in the constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation, and although the clause to that effect in the constitution of the United States applies only to acts by the United States, and not to the government of the state, yet the principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina." The learned judge who wrote that opinion was correct in saying that the fifth amendment to the constitution of the United States, to which he evidently referred, was a restriction only upon the power of the United States, and not that of the states; but he overlooked the fourteenth amendment, then of recent adoption, under which it has been expressly held that a state cannot appropriate private property to public use without compensation. *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979. In that case the court says on page 236, 166 U. S., page 584, 17

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Sup. Ct., and 41 L. Ed. 979: "But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the fourteenth amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the state to public use, and without compensation, of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. 'Due process of law,' as applied to judicial proceedings instituted for the taking of private property for public use, means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation." Again the court says on page 234, 166 U. S., page 584, 17 Sup. Ct., 41 L. Ed. 979: "But a state may not, by any of its agencies, disregard the prohibitions of the fourteenth amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. This court, recurring to the fourteenth amendment, has said: 'Can a state make anything due process of law which by its own legislation it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail or has no application where the invasion of private rights is effected under the forms of state legislation,'"—citing *Davidson v. City of New Orleans*, 96 U. S. 97, 102, 24 L. Ed. 616. It is well settled that the denial of an adequate remedy for enforcing a right is the denial of the right itself, and the adequacy of the remedy must be determined by its practical results. In *Henderson v. Mayor*, 92 U. S. 259, 23 L. Ed. 543, the court says: "In whatever language a statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect." In *Simon v. Craft*, 182 U. S. 427, 436, 21 Sup. Ct. 836, 839, 45 L. Ed. 1165, the court says: "The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied, we are governed by the substance of things, and not by mere form."

These federal citations become the more important in view



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of the defendant's claim to its right of way by virtue of its acceptance of the provisions of an act of congress entitled "An act to aid in the construction of telegraphs and secure to the government the use of the same for postal, military and other purposes," approved July 24, 1866. For this contention it relies on the case of *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708. Bearing in mind that the question before us is not whether the defendant shall have its right of way, but whether it shall pay for it, the case it cites becomes an authority against it. That court, construing the act, says on page 11, 96 U. S., 24 L. Ed. 708: "It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business, but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges." And again, on page 12, 96 U. S., 24 L. Ed. 708, the court says: "No question arises as to the authority of congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the constitution is not interfered with. Only national privileges are granted." So broad a disclaimer should seem to settle the question, and, on reason and authority, we concur in the effect of the federal decisions that the act of congress referred to gives the defendant no right to any part of the land of the plaintiff, or to any use therein. *Atlantic & P. Tel. Co. v. Chicago, R. I. & P. R. Co.*, 6 Biss. 158, Fed. Cas. No. 632; *W. U. Tel. Co. v. American Union Tel. Co.*, 9 Biss. 72, Fed. Cas. No. 17,444.

The defendant again contends that as its poles are located on the right of way of the railroad company (that is, its potential right of way), and as it has acquired its easement from the railroad company by condemnation proceedings under the Code, it owes no further duty to the owner of the land. We cannot concur in this view. The land on which the poles are situated is not in the actual possession of the railroad company, and apparently never has been. On the contrary, it has been in constant cultivation by the plaintiff and those under whom he holds. The nature of the easement acquired by railroad companies under condemnation proceedings has been too recently considered by this court to require further discussion. *Shields v. Railroad Co.*, 129 N. C. 1, 39 S. E. 582. In that case the court says on page 4, 129 N. C., and page 583, 39 S. E.: "It therefore seems to be the settled law in this state, so far as judicial construction can settle a question, that a railroad company by condemnation proceedings only acquires an easement upon the land condemned, with the



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right to actual possession of so much only thereof as is necessary for the operation of its road, and to protect it against contingent damages." It is not contended that the lines of the defendant are in any degree essential to the operation of the railroad. On the contrary, it is stated in the opinion of the court in the proceedings under which the defendant claims to have acquired its easement that "the railroad company denies altogether that any benefit or advantage can arise to it in the erection of the telegraph lines, and, on the contrary, avers that it is detrimental to it in the last degree." *Postal Tel. Cable Co. v. Southern R. Co.* (C. C.) 89 Fed. 190, 196. Under the circumstances, it is clear that the additional easement claimed by the defendant is an additional burden upon the land, for which the owner is entitled to just compensation. *Atlantic & P. Tel. Co. v. Chicago, R. I. & P. R. Co.*, supra; *Daily v. State*, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578; *Telegraph Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200; *Keasbey, Electric Wires*, § 185. The Maryland case is an able and elaborate discussion of the entire question. The kindred question involving the same principle, of railroads upon streets, is fully considered in the well-known cases of *Story v. Railroad Co.*, 90 N. Y. 122, 43 Am. Rep. 146, and *Lahr v. Railway Co.*, 104 N. Y. 268, 10 N. E. 528, in which it was held that the abutting owners were entitled to compensation for the additional burden imposed upon the streets by the elevated roads. *White v. Railroad Co.*, 113 N. C. 610, 18 S. E. 330, 22 L. R. A. 627, 37 Am. St. Rep. 639, is also a well-considered case in our Reports.

The plaintiff was not a party to the condemnation proceedings, nor have any proceedings been instituted against him by the defendant to acquire an easement or any other right. The defendant relies upon that part of section 2010 of the Code which says: "And if the use or right sought be over or upon an easement or right of way, it shall be sufficient to give jurisdiction if the person or corporation owning the easement or right of way be made a party defendant." Here the defendant stops, but the Code immediately proceeds to say: "Provided that only the interest of such parties as are brought before the court shall be condemned in any such proceedings." By the very terms of the statute, the plaintiff now stands as if no condemnation proceedings had ever been brought.

Again, the defendant contends that the plaintiff should have proceeded to have his damages assessed under chapter 49 of the Code, but section 2010 gives the right to file a petition in condemnation proceedings to the telegraph company alone, and, with section 2011, specifically provides how the proceeding shall be commenced. Section 2012 evidently refers to the proceedings subsequent to the filing of the petition and the service of the required notices. In other words, it refers to

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that property, against his will, for a public purpose, he is entitled to all the safeguards which the law has thrown around the exercise of the tremendous, though wholesome, right of eminent domain."

In the absence of material error the judgment is affirmed.  
MONTGOMERY, J., dissents.

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APPEAL OF NEW YORK, N. H. & H. R. Co.

(*Supreme Court of Errors of Connecticut, Nov. 11, 1902.*)

[53 Atl. Rep. 314.]

**Railroad Crossings—Change of Street Grade—Construction of Bridge.**

A railroad company having constructed a spur track across a highway at grade, and it being part of its system, and being presumed to have been constructed with due authority, and the company being bound to maintain and operate it till it is legally discontinued, and no steps for discontinuance having been taken, the court has jurisdiction to order a bridge for support of such track under which the highway may be carried.

Appeal from superior court, Litchfield county; Alberto T. Roraback, Judge.

Petition of the selectmen of the town of Plymouth to the railroad commissioners to compel a change of grade in a highway in said town at a point where it was crossed at grade by the railroad of the New York, New Haven & Hartford Railroad Company. The commissioners ordered the highway to be carried under the railroad, three-quarters of the expense to fall on the railroad company and the rest on the town. From this order the railroad company appealed to the superior court for Litchfield county where the Bristol & Plainville Tramway Company was made a party, and on a hearing had to the court a judgment was rendered confirming the order for a change of grade, except that the cost to the railroad company was reduced to half the total expense, the town and the tramway company each to pay a quarter. The railroad company appeals. Affirmed.

William F. Henney, for appellant New York, N. H. & H. R. Co.

Noble E. Pierce and Marcus H. Holcomb, for respondent Bristol & Plainville Tramway Co.

Samuel A. Herman, for respondent Town of Plymouth.

BALDWIN, J. The appellant is the successor in title to a railroad company which laid several tracks across an existing highway at grade. One of these is a spur track, leading to a warehouse owned by private individuals, and on which the appellant also was in the habit of placing cars from which to deliver goods to other parties. This diverges from the main tracks at a point several hundred feet distant from the highway. The order appealed from requires the construction of

two bridges under which the highway is to be carried. One of them is solely for the support of the spur track, and will be over 70 feet distant from the other. At the hearing in the superior court the appellant claimed that the expense of the change of grade asked for would be so great that no change should be ordered, and included in its estimate of such expense the cost of the bridge for the spur track. Such a bridge will cost about \$5,000, and the appellant now claims that the court had no jurisdiction to order one, since this track was laid simply to facilitate business with the owner of a particular warehouse. The finding does not support this claim. It shows that the track is also used for the delivery of goods to other parties, and that it is part of the appellant's railroad system. That it was constructed without due authority of law is not to be presumed; and it could not have been legally laid on the highway except by virtue of a special franchise, and pursuant to a location duly made by the appellant and approved by the railroad commissioners. *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 146, 160, 36 Atl. 1107. Being a part, and apparently a material part, of the appellant's railroad system in the locality in question, it was bound to maintain and operate this track until it should be legally discontinued. *State v. Hartford & N. H. R. Co.*, 29 Conn. 538, 547. No step towards its discontinuance had been taken when the cause was heard in the superior court, and the appellant cannot complain that the judgment was not so framed as to provide for a possibility, which it had not suggested, of a discontinuance at some future period.

It is also assigned for error that at least half of so much of the whole expense of elevating the tracks and bridging the highway as was not assessed against the town should have been charged upon the tramway company. The petition of the town was brought at the instance of that company, and by the erection of the main bridge ordered it would be enabled to construct a contemplated extension of its road, authorized by its charter, with more convenience and less expense. No evidence was offered to show which company would derive the most benefit from the elimination of the grade crossing, or upon which any definite rule of apportionment, as between them, could be founded, nor was any decisive light as to these matters obtained from a view of the premises taken by the court at the request of all parties. The town could not be charged with more than a quarter of the expense (Gen. St. § 3713), and this full amount was assessed against it in the judgment. Under these circumstances it was necessary and proper, if the tramway company was to pay anything, to make such an apportionment between it and the appellant as might seem, on the whole, just and fair (Gen. St. § 3716); and there is nothing in the record to indicate that any inequitable result was reached.

There is no error. The other judges concurred.

## SEATTLE &amp; M. R. CO. v. BELLINGHAM BAY &amp; E. R. CO.

(Supreme Court of Washington, Aug. 26, 1902.)

[69 Pac. Rep. 1107.]

**Railroad Right of Way of Another Company—Certiorari to Review  
Condemnation Proceedings—Jurisdiction.**

Const. art. 1, § 16, provides that, whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public. Article 4, § 4, provides that the supreme court shall have power to issue writs of certiorari, etc., and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. No review on appeal of the question of public use and interest involved in the exercise of eminent domain proceedings is allowed: *held*, that the supreme court had jurisdiction to issue certiorari to bring up for review the record in an action adjudging the right of way of one railroad necessary for another road, that the intended use was a public one, and that the public interest required its appropriation.

**Same—Same—Same—Same—Sufficiency of Application.**

An application for certiorari, praying for a review of an adjudication that the right of way of one railroad can be condemned for the use of another railroad, or that it is for a public use, and required by the public interest, and denying the power to appropriate such property because it is already appropriated for the construction and operation of a railroad, states sufficient cause for the issuance of the writ.

**Same—Same.**

2 Ballinger's Ann. Codes & St. § 5647, authorizing the appropriation by a railroad of a longitudinal section of existing right of way through canons, passes, and defiles, does not exclude the appropriation of existing right of way in all other cases; and one railroad may, when necessary, condemn a right of way through the right of way of another railroad not in use for railroad purposes, and not necessary for the corporation franchises.

**Same—Same.\***

The taking of an existing right of way for the right of way of another railroad, which was shown to be practicable, necessary, and reasonably safe, did not violate the rights of the first company.

Certiorari to superior court, Whatcom county; Jeremiah Neterer, Judge.

Certiorari by the Seattle & Montana Railroad Company to the superior court of Whatcom county to review a judgment for plaintiff in a condemnation proceeding by the Bellingham Bay & Eastern Railroad Company against relator. Affirmed.

Kerr & McCord and Will H. Thompson, for petitioner.

Dorr & Hadley, for respondent.

REAVIS, C. J. The Bellingham Bay & Eastern Railroad Company, respondent, brought an action in the superior court of Whatcom county to condemn for its use as a right of way certain real property owned by the Seattle & Montana Railroad Company, the petitioner, at Fairhaven. Upon the

\*See *Baltimore & O. S. W. Ry. Co. v. Board of Com'rs of Jackson County (Ind.)*, 20 Am. & Eng. R. Cas., N. S., 716, and foot-note.



trial of the action it was adjudged that the right of way described in the petition and sought to be appropriated was necessary for the respondent railway company, and the intended use thereof a public one, and that the public interests required the appropriation thereof, and an order was entered directing that a jury be impaneled to assess the damages for the taking of petitioner's property. Petitioner excepted, and in this proceeding prays a review of the adjudication that the property sought to be condemned can be taken for this use, or that it is for a public use and required by the public interest, and denies the power to appropriate the property of the petitioner, because, as alleged, it is already appropriated by petitioner for a public use; that is, the construction and operation of its own railway. After finding the preliminary facts of notice, hearing, and that each (petitioner and respondent) is a railway company operating lines of railroad between Fairhaven and other points, and that each is authorized to own and condemn real property for such uses, the other material facts in issue are set forth as follows: "(12) That the respondent [here petitioner], Seattle & Montana Railroad Company, is the owner of the lands sought to be appropriated, and that the same are embraced within a tract of land 100 feet in width owned by said Seattle & Montana Railroad Company, and claimed by it as right of way for its railroad, which said 100-foot strip of land has been acquired by said Seattle & Montana Railroad Company by purchase for railway purposes, but has never been condemned for such purposes. (13) That the respondent [here petitioner], Seattle & Montana Railroad Company, requires for the operation of its railway line and system over and across said 100-foot strip and alleged right of any one main track, a passing track, and two storage tracks, and no more,—making four tracks in all,—and that none of said land sought to be appropriated by petitioner, Bellingham Bay & Eastern Railroad Company, is necessary or required for the use of the respondent, Seattle & Montana Railroad Company, in the operation of its railroad, and that the taking and appropriation thereof by said petitioner will not interfere with the operation of said four tracks of said respondent, Seattle & Montana Railroad Company, nor with the operation of its said railway system, in any manner or at all. (14) That, in the construction and for the necessary operation and maintenance of said line of railroad of said petitioner [here respondent], it is necessary for it to have each and every part and parcel of said above-described tract of land for such right of way, for the uses and purposes of its railway, over and across said lands, real estate, and premises as hereinbefore described. (15) That the contemplated use for which the said land, real estate, and premises are sought to be appropriated is really a public use, and that the public interest requires the prosecution of the enterprise being prosecuted by petitioner, and requires the appropria-

tion of said lands as prayed for in said petition, and that the said land, ~~real~~ estate, and premises so sought to be appropriated are required and necessary for the purposes of such enterprise." Petitioner excepted to the findings of fact numbered here, and the evidence is before us by stipulation. Respondent, the Bellingham Bay & Eastern Railroad Company, demurs to the petition for the writ, and, in objecting thereto, alleges want of jurisdiction in this court to issue the writ, and because the application does not state facts sufficient to state a cause of action.

1. The demurrer will first be considered. Our constitution (article 1, § 16) declares: "Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damages for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public." "Whenever an act determines a question of right or obligation or of property, as the foundation upon which it proceeds, such an act is to that extent judicial." *Wulzen v. Board* (Cal.) 35 Pac. 353, 40 Am. St. Rep. 17; *Sinking-Fund Cases*, 99 U. S. 761, 25 L. Ed. 496. The jurisdiction of this court is clearly defined in article 4, § 4, of the constitution, as follows: "The supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before



himself, or before the supreme court, or before any superior court of the state, or any judge thereof." It has appellate jurisdiction in all actions and proceedings except in civil actions at law for the recovery of money or personal property, where the original amount in controversy or the value of the property does not exceed the sum of \$200. It may also issue all writs necessary to its appellate and revisory power. But it is urged that the court, in *Seattle & M. Ry. Co. v. State*, 5 Wash. 807, 32 Pac. 744, denies the power to issue the writ of certiorari to review the adjudication of the question of public use and necessity in the superior court. It may be observed that the court there did not consider the nature of the appeal act in eminent domain cases, and the writ was denied because a remedy was assumed to exist in appeal. However, later, in the case of *Western American Co. v. St. Ann. Co.*, 22 Wash. 158, 60 Pac. 158, it is decided that the only question which can be reviewed on appeal under the special statute for that purpose is the "propriety and justness of the damages"; and the following language found in *Western American Co. v. St. Ann. Co.*, supra: "But we do not see any particular merit in this contention, for questions which the law submits to the exclusive jurisdiction of the superior courts may be as purely judicial questions as though they were tried in this court,"—can only apply to the exception which the constitution declares to the appellate jurisdiction of this court. The legislature can make no exception. It may fail to provide the procedure for appeal in a special case, but the power of constitutional review still remains in this court. In *Browne v. Gear*, 21 Wash. 147, 57 Pac. 359, we defined the power of the superior court and the functions of the writ of certiorari under the statute. The writ was issued in *State v. Moore*, 23 Wash. 276, 62 Pac. 769. In *State v. Superior Court of Kings Co.*, 66 Pac. 385, the writ was issued where appeal was inadequate, and the revisory power of this court was exercised in reviewing and correcting an order of the superior court. It having been adjudged that no review on appeal of the question of public use and interest involved in the exercise of eminent domain proceedings now exists, it follows that the writ of certiorari may be issued to bring up the record for review in the proceedings for appropriation of the right of way through petitioner's real property. The application for the writ states sufficient cause for its issuance.

2. The real property through which the right of way is sought to be appropriated was purchased by petitioners 11 years ago, and is parcels included in a larger tract of tide lands purchased at the same time by the petitioner. Other portions of such land so purchased have been granted by petitioner to various parties, who have erected thereon improvements such as foundries and canneries. All the property lies within the city limits of Fairhaven. Petitioner has reserved 100 feet for its right of way. There are two railroad tracks which are

spurs in operation by petitioner upon this 100 feet. The strip of land sought to be condemned is 28 feet taken off one side of the 100 feet for a distance of several hundred feet in length. The respondent's road enters the town across the water and tide lots, and seeks to go to its terminal grounds by a line that diagonally crosses the tracks and right of way belonging to petitioner, also situated on tide-land lots. It then seeks to continue on its proposed right of way of 28 feet for several hundred feet parallel to the tracks of petitioner to its terminal grounds. It is maintained by counsel for petitioner that, where one railroad has appropriated real property for its uses, another railroad company cannot longitudinally appropriate a part of the right of way for the same uses, and the point is urged that property once appropriated to a public use cannot be condemned for another public use without express legislative authority. It is further asserted that there is no such express authority from the legislature; and section 5647, 2 Ballinger's Ann. Codes & St., is referred to as containing an express provision for appropriation of a longitudinal section of existing right of way through canons, passes, and defiles, and it is inferred therefrom that such provision is exclusive, and no other appropriation of such right of way than expressed in the statute can be implied. The question is, does the section mentioned intend such right of condemnation as is granted in the general statute of eminent domain? The right is expressed in the authority for judgment as follows: "And at the time of rendering judgment for damages, whether upon default or trial, the court, or judge thereof, shall enter a judgment or decree authorizing said railroad company to occupy and use said right-of-way, road-bed, and track, if necessary, in common with the railroad company or companies already occupying or owning the same, and defining the terms and conditions upon which the same shall be so occupied and used in common." The purpose of this enactment is to prevent any railroad from occupying its own tracks exclusively where the physical conditions are such that another railway cannot be operated through such place, and the statute contemplates, if necessary, a common easement over the same land and tracks. The section is a part of the general statute relating to eminent domain. Sections 5637-5643, inclusive, 2 Ballinger's Ann. Codes & St., prescribe the procedure for condemnation of right of way by railroad companies. The court in such proceedings must, from competent proof, adjudge that the contemplated use of the land sought to be appropriated is a public use, and that the public interests require the prosecution of the enterprise. Perhaps the strongest authority in support of the position urged by petitioner is the case of *Illinois Cent. R. Co. v. Chicago, B. & N. R. Co.* (Ill.) 13 N. E. 140. In that case an endeavor was made by the petitioner to condemn a part of the right of way along the Mississippi river bottom belonging to another railroad company.

The way had been acquired partly through a grant by congress, and the remainder by condemnation under the state statutes. The general statute of Illinois authorized a railroad company to appropriate absolutely "a stream of water, water-course, street, highway, plank-road, turnpike, road, or canal." The court held that, the legislature having undertaken to prescribe what particular public properties might be appropriated, the rule, "*Expressio unius est exclusio alterius*," was applicable. Our statute is general, and authorizes the appropriation of "all land, real estate, or other property" necessary for the construction of the railroad. It also appears in the Illinois case that the right of way sought to be condemned was acquired by the railroad occupying it through legislative grant and by condemnation. In some of the authorities cited by counsel for petitioner the language used seems to justify the position urged by counsel, that a right of way owned by one railroad company cannot, without express legislative authority, be condemned for another public use of the same nature. Among them are *Railroad Co. v. Brownell*, 24 N. Y. 345; *Baltimore & O. S. W. Ry. Co. v. Board of Com'rs of Jackson Co.* (Ind. Sup.) 58 N. E. 837, 839; *State v. Mayor, etc., of City of Paterson* (N. J. Sup.) 39 Atl. 680. It may be observed that in some of these cases the claim made by the appropriator was for the condemnation of railroad tracks in operation, or for depot grounds already occupied, and the use sought by condemnation was inconsistent with the operation of the railroad company already owning the property. But the general rule maintained by the petitioner, and the authorities supporting the same, is not so applied as to prevent one railroad from taking the property which is not in use for railroad purposes, and not necessary for the corporate franchises. *Lewis, Em. Dom.* (2d Ed.) § 267a, and authorities cited. The following rule stated in the text by the same author (section 267b) seems to be well supported by the authorities referred to therein: "It is manifest, however, that even a railroad company which is organized under a general law may show a reasonable necessity for taking part of the right of way of another road, as when it is located through a town in which another road has been previously built, and the topography or other conditions are such that the new road cannot reasonably be located so as to accommodate the public and accomplish the object in view without either encroaching on the right of way of another company, or incurring ruinous or greatly increased expense. The same necessity may arise in mountainous counties, or else the first company might preclude all others from reaching certain localities. But this implied authority only extends to the taking of so much of the right of way of the first company as can be spared without material detriment. The question is whether the new condemnation can be made without destroying the use and usefulness of that part of the first-acquired



right of way which is in actual use, or so obstructing or hindering or embarrassing it as to render it unsafe. Just what the degree or necessity must be to justify the taking, it is difficult to say. One company cannot take part of the right of way of another merely because it is more convenient. It is largely a question of practicability and expense,—of comparative advantage and injury,—having regard always to the interests of the public, for whose benefit the general authority is given, and the particular taking proposed."

3. In the present instance it appears that about 11 years ago petitioner acquired by purchase a considerable area of tide lands in front of the city of Fairhaven. This quantity of tide lands was evidently not all acquired for its corporate purposes and uses. Subsequently it has sold for private purposes several parcels, and still owns several parcels not in use for railroad purposes. Its reservation of the 100 feet for right of way has not yet been used, with the exception of the two spurs for trackage purposes extending from its station. The proofs offered by the petitioner tended to show a contemplated use for at least four tracks, and that the same were intended to be constructed immediately. The proofs at the hearing also tended to show that 30 feet was sufficient for the operation of two tracks, or 60 feet for the four proposed tracks. Respondent seeks to acquire 28 feet for two tracks. There is testimony tending to show that the operation of trains by the two railroad companies, if respondent is given the appropriation sought, is practicable, and, with care and some increased cost, is reasonably safe. It was observed in *Mobile & G. R. Co. v. Alabama Midland Ry. Co.*, 87 Ala. 508, 6 South. 404: "As a general proposition, it may be said that railroad companies organized under the general laws are authorized by the statutes to acquire by condemnation the right of way of another corporation, when essential to the accomplishment of their principal purposes, or when there is space for the tracks of parallel roads without obstructing the use of the same. The statutes have been so construed, and to that construction we adhere. *Armiston & C. R. Co. v. Jacksonville, G. & A. R. Co.*, 82 Ala. 297, 2 South. 710; *East & W. R. Co. v. East Tennessee, V. & G. R. Co.*, 75 Ala. 275." The principle is stated in *Re City of Buffalo*, 68 N. Y. 167: "In determining whether a power generally given is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded for the subsequent public use. If both uses may not stand together, with some tolerable interference, which may be compensated by damages paid; if the latter use, when exercised, must supersede the former,—it is not to be implied, from a general power given, without having in view a then

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existing and particular need therefor, that the legislature meant to subject lands devoted to a public use already in exercise to one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift of power made in general terms." The following authorities are pertinent: *Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & I. R. Co.*, 24 Am. Rep. 545; *Colorado E. Ry. Co. v. Union Pac. R. Co.* (C. C.) 41 Fed. 293; *Baltimore & O. S. W. R. Co. v. Board of Com'rs of Jackson Co.* (Ind. Sup.) 58 N. E. 837; *Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.* (Minn.) 79 N. W. 317. The necessity must always be shown when one railroad attempt to appropriate the property of another. This necessity was found by the court. This principle is stated in *Mobile & G. R. Co. v. Alabama Midland Ry. Co.*, supra, as follows: "A necessity, such as authorizes one railroad corporation to condemn a part of the right of way of another, does not mean an absolute and unconditional necessity, as determined by physical causes, but a reasonable necessity under the circumstances of the particular case, dependent upon the practicability of another route, considered in connection with the relative cost to one and probable injury to the other; and the right of condemnation is not made out unless the petitioning company shows that the cost of acquiring and constructing its road on any other route clearly outweighs the consequent damage which may result to the older company, not including the question of competition for the business of a manufacturing (or other large) establishment on the line of the proposed route."

From the review on the merits, as it appears from the record before us, we conclude that no rule of law affecting the rights of petitioner has been violated to its prejudice. Relative to the facts found by the superior court, an examination of the bill of exceptions shows that competent proof was made of all the facts necessary to be found, and there is no such preponderance of proof against the findings as to set them aside. The order of the superior court is therefore affirmed.

ANDERS, MOUNT, DUNBAR, WHITE, and HADLEY, JJ., concur.

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(*Circuit Court of Appeals, Fifth Circuit, May 31, 1902.*)

[116 Fed. Rep. 335.]

## Appeal—Questions Reviewable—Excessive Verdict.

The circuit court of appeals cannot review a judgment on the ground that the jury was not impartial unless the record affirmatively shows that it was improperly influenced, or was governed by passion or prejudice; and that the verdict may have been for too large an amount does not show either of such facts.

## Same—Sufficiency of Evidence.

Where defendant did not ask the direction of a verdict, the circuit

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court of appeals cannot review a judgment for plaintiff on the ground that the verdict is not supported by the evidence.

**Same.**

Contributory negligence is a matter of defense, and, where the question has been submitted to the jury under proper instructions, their finding thereon cannot be reviewed on a writ of error.

**Master and Servant—Injury of Switchman—Contributory Negligence.\***

Contributory negligence on the part of a railroad switchman cannot be predicated on the mere fact that he mounted a moving train which was being switched in the yards of the company where he was at work.

**Same—Assumed Risks—Servant Employed in Making Place Safe.**

A railroad switchman who, with knowledge that the yards in which he was working had become defective and dangerous by reason of loose stones and rock which had been left therein, in the vicinity of the tracks, on being told by the foreman that he was going to clear away the obstructions, consented to remain in the service, and assisted in the work by switching cars to the places needed, while so engaged assumed the risk from such obstructions; and he had no right to rely absolutely on a statement of the foreman that a certain part of the yards had been cleared, where he had equal opportunity to see and know the fact.

**In Error to the Circuit Court of the United States for the Eastern District of Texas.**

This is an action at law by the defendant in error, Robert H. Billingslea, herein called plaintiff, to recover damages for personal injuries against the Kansas City Southern Railway Company and Samuel W. Fordyce and Webster Withers, as receivers of the properties of the Kansas City, Pittsburg & Gulf Railway Company, the Texarkana & Ft. Smith Railway Company, and the Kansas City, Shreveport & Gulf Railway Company, herein styled defendants.

The cause of action accrued against said Fordyce and Withers, receivers as aforesaid; and the Kansas City Southern Railway Company was the purchaser at foreclosure sale of the receivership properties, and thus, it is not denied, became liable under the orders of sale and confirmation for the cause of action counted on if established against said receivers. Webster Withers died pending the suit, and the action proceeded against Samuel W. Fordyce as surviving receiver. The suit resulted in a verdict for \$20,000 damages, and in a judgment on remittitur for the sum of \$15,000 in favor of the plaintiff; payment to be enforced by execution against the Kansas City Southern Railway Company.

The plaintiff, at the time of the alleged injuries, was in the employment of the said Fordyce and Withers, receivers, serving them as a switchman in the yard of the Texarkana & Ft. Smith Railway Company at Port Arthur, Tex. It is shown by the evidence that, on account of certain work which was being done in and about the yard and at the wharf, the yard

\*As to whether there can be recovery for injuries to employees caused by attempts to board moving cars and engines, see *Kilpatrick v. Grand Trunk Ry. Co. (Vt.)*, 20 Am. & Eng. R. Cas., N. S., 300, and note, 303 et seq.



had become littered up and obstructed on account of the rocks or stones unloaded from, falling from, and knocked off the trains, constituting plain and visible and more or less dangerous obstructions on or near the tracks. At the time of the plaintiff's injury, the agents of the receivers were, and had been for some days, engaged in clearing the yard, and receiving and hauling away the rocks, and it was a part of plaintiff's duty to switch and locate the cars and place them along the tracks at proper places for that purpose. The placing of the cars at the proper places was a part of the work intended to clean up and put the yards in safe condition. It further appears that the plaintiff knew of the condition of the yard, and about four or five days before the casualty talked of the same, and in regard to remaining on that account in the employment of the receivers, to the yard foreman, a Mr. Murphy, who had charge of the yard, and who was the receivers' authorized agent; and, as this conversation seems important, we quote from plaintiff's evidence as follows:

"Q. Had you ever had any conversation with Mr. Murphy in regard to the condition of that track, and anything they were supposed to do with it? A. Mr. Murphy had only been there a week or ten days before the accident. Five or six days before the accident I was sitting on the company walk, a walk extending 150 yards in front of the depot. The engine was working, and had left me there, and the conversation came up between Mr. Murphy and I as to the condition of the yard. I made the remark, 'It will not bother me, as I will not be here long.' He said, 'I came here under instructions to put the yards in good condition, and I will do it.' The next morning after that conversation we put eight cars at his disposal on track No. 5. Q. You told him you were not going to stay there? A. Yes, sir; I told him that I would not work in yards in the condition they were. Q. You gave him that as a reason why you thought of moving? A. Yes, sir. \* \* \* Q. What is usual and customary in regard to keeping switch yards in condition? A. In all yards I have been employed in, I have found on the part of the management that it was necessary for the men in charge to keep the yard in perfect working condition, and keep cleaned all obstructions that are dangerous to the employees employed in the yards, such as pieces of rock, stone, and things left lying over the yard. Q. What is the necessity of that? A. To prevent accidents occurring while switchmen are working. Q. What did you say that Murphy said he would do in regard to clearing away those rocks, and when he was going to clear the yards? A. He said he was going to do it. Q. He said he was going to do it? A. Yes, sir. Q. Did that have an effect on our intention to remain or otherwise? A. Yes, sir; I was satisfied with the position I had. The position was not hard, and I got a very nice salary, and I did not propose to give it up

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if I thought I was safe. I relied on the promise, and thought he was executing the promise by removing the rocks."

The jury returned a verdict in favor of the plaintiff for \$20,000, and thereupon judgment was entered. A motion for a new trial was entered and argued by counsel, whereupon the court declared that, if the plaintiff remitted \$5,000 of the verdict and judgment, said motion would be denied; otherwise, sustained; the court, at the same time, declaring that it was of opinion the verdict was too large merely from over estimation, and not from any improper motive on the part of the jury. Thereupon a remittitur was entered in the sum of \$5,000, accepted by the court, and judgment entered for \$15,000. Other material facts are stated in the opinion of the court.

Hal. W. Greer, R. A. Greer, and Thos. R. Morrow, for plaintiffs in error.

P. K. Ewing and H. F. Ring, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

After stating the facts as above, PARDEE, Circuit Judge, delivered the opinion of the court.

The first assignment of error charges that "the verdict of the jury for the full amount sued for, to wit, \$20,000, for the loss of plaintiff's left foot about half way between the knee and the foot, manifests that the jury was prejudiced, and was influenced by passion or ignorance, and did not render an impartial verdict under the facts nor charge of the court." We find nothing in the record to indicate that the jury was influenced by either passion or ignorance, but, on the contrary, find that, in the opinion of the trial judge, the amount of the verdict was not due to any improper motive on the part of the jury, but, in so far as it was excessive, resulted from over estimation. The contention raised by this assignment of error is entirely beyond our jurisdiction to review unless the record affirmatively shows that the jury was either improperly influenced, or was governed by passion and prejudice, to the material injury of the parties.

The second assignment of error is to the effect that the verdict and judgment of \$15,000 was excessive, and needs no consideration.

The fourth assignment of error is to the effect that the verdict of the jury is against the clear weight and preponderance of the testimony. The defendant did not move for a general charge to the jury, but allowed the case to be submitted on the evidence, and the matter is therefore beyond our review.

The fifth assignment of error is to the effect that the verdict is contrary to, and not supported by, the law as given in the charge of the court, nor by the evidence admitted under the ruling of the court, in that if the cars were in motion, whether

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rapidly or slowly, in response to plaintiff's signal, the same did not require the plaintiff to mount said moving cars; and the direct and proximate cause of his injury was his own act in attempting to mount said moving cars.

The sixth assignment of error is that the verdict and judgment are not supported by the admitted facts in that plaintiff mounted a moving train of cars, in a yard which he had testified he knew to be dangerous by reason of the rocks and obstructions, and his own testimony showed he was injured by one of these obstructions. We understand these two assignments of error are based on the proposition that the plaintiff was guilty of contributory negligence, and we think they are not well taken, because contributory negligence is a matter of defense, and in this case that question was submitted to the jury on the evidence, with instructions regarding the same fully as favorable to the defendants as the law will allow.

The seventh assignment of error complains of the overruling of defendants' motion for a new trial, and needs no consideration.

The eighth assignment of error is the overruling of the defendants' general demurrer to the plaintiff's petition, in that the same fails to state a cause of action in this: that it alleges plaintiff, in his capacity of switchman, attempted to mount a moving train of flat cars, and was injured by so doing; thereby and therein alleging contributory negligence per se on his part. As stated above, contributory negligence is an affirmative defense, and we do not think it can be predicated upon the mere fact that a switchman mounted a moving train which was being switched in the yards of the company.

This disposes of all the assignments of error except the third, to the effect that the court erred in laying great stress upon and in repeating the charge that if defendants' agent Murphy assured plaintiff that the yard where the injury occurred was repaired, and the obstructions removed, and if plaintiff relied on such statement and was injured, he could recover. The exception on which this assignment is based was as follows:

"Mr. Greer. I wish to except to that portion of the court's charge to the effect that if Murphy assured and stated to the plaintiff that that portion of the yard had had the obstructions removed therefrom, and he acted thereon, as laying too great a stress upon the proposition, and we think that if this plaintiff, in the discharge of his duties, had equal opportunities with Murphy to know whether such obstructions had been removed or not, that it was his duty to exercise that knowledge and information for himself."

The case shows that the railroad yard wherein the plaintiff was injured, and the several tracks therein, through the course of business had become obstructed and dangerous from loose rocks and stones, which had fallen off the trains, and refuse

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or rejected rocks dumped therein; that this condition was known to the receivers, who had taken the initiative to have the yard and tracks cleared, and to the railroad employees and trainmen, who were called on to work in said yard; that such condition was well known to the plaintiff, who was employed in the yards as a switchman, and in handling the trains and cars actually in use in the work of clearing up; and that the plaintiff considered the question of remaining in the employment on account of the obstructions, and on the statement of Murphy, the yardmaster, "I came here under instructions to put the yards in good condition, and I will do it," remained in the employment, and thereafter, until four or five days later, when he was injured, assisted in the work of clearing up. As to the risks assumed by the plaintiff under this state of the facts, the trial judge charged the jury as follows:

"If an employee knows, or in the discharge of his duty must reasonably know, that obstructions or defects exist in regard to the matters with which he is coming in contact, or must necessarily come in contact, and voluntarily continues in the employ of the company, and is thereafter injured in consequence of such defects or obstructions, he cannot recover, upon the ground of assumed risks. \* \* \*

"Now, in this case you are to take all the testimony. If Mr. Billingslea was injured without any fault on his part which contributed to the injury, and his injury was due solely to a defect in the roadbed from a stone or rock or dangerous obstruction being thereon, and such obstruction had been there such length of time that the parties in charge of that yard for the receivers would have known it, and had time to have removed it, and the plaintiff did not know it was there, and was injured in consequence of it, without fault on his part contributing to his injury, the plaintiff would be entitled to recover. Or if the plaintiff was given a promise by Mr. Murphy, and he was authorized to represent the receivers, that he would remove these obstructions, in that state of case the plaintiff would have the right to remain in the employ of the company a reasonable length of time for such obstructions to be removed; and if, under the circumstances of the particular case, such time had not elapsed, by remaining in the employ and relying upon the promise of Mr. Murphy, if such promise was made, it would not be the assumption of risk on his part, and if he was not guilty of contributory negligence in any other particular it would not debar a recovery. Or if you believe from the evidence that Mr. Murphy, immediately before the accident occurred, informed Mr. Billingslea that the portion of the track where he was then going to work had been cleared of the obstructions, and Mr. Billingslea relied upon that statement, and did not know it to be untrue in fact, and undertook to perform the work, and without fault on his part was injured, in that state of case the plaintiff would be entitled to recover.



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"One witness testified that it was the duty of Mr. Billingslea to remain at the switch, and not attempt to get on the car. The plaintiff states that it was his duty to get on the car, in order to go to the other part of the yard, in order to give the signal to the engineer where to stop the cars. That, gentlemen, is a disputed question of fact between the plaintiff and the defendant; the defendant's contention being that it was Mr. Billingslea's duty to remain at the switch, and the plaintiff's contention being that it was his duty to get on the car, and signal the engineer where to stop the cars. That is a question for you to determine, gentlemen, from all the evidence. If you find from the testimony in this case that it was Mr. Billingslea's duty to remain at the switch, and not to get upon the car, in that state of case, you are instructed that if he attempted to get upon the car, and it was his duty to remain at the switch, he would be guilty of contributory negligence, and you will find against him. But if you find from the evidence that it was not his duty to remain at the switch, but was his duty to get upon the car, and signal the engineer where to stop, then you are instructed that he could recover if he was injured in consequence of a defect in the track or roadbed of which he did not know, provided such obstruction was of such character as those in charge of the yard must have known, or in the exercise of ordinary care would have known, to be dangerous. Now, upon that phase of the case, it has nothing to do with the question of promise to repair. If Billingslea did not know it was defective, and the parties in charge of the yard knew it was dangerous, or by the use or exercise of ordinary care would have known that it was dangerous, in that state of case it would have been the duty of the defendant to remove such obstruction, if any, and if they failed so to do, and plaintiff was injured in consequence thereof, he would be entitled to recover,—that is, independent of the promise to remove the obstructions. Upon that phase, if Mr. Murphy had assured him that the yard was clear of obstructions, and Mr. Billingslea did not know to the contrary, and in the discharge of his duty, and without any act of contributory negligence on his part, he was injured in consequence of such defective condition, relying on such promise, he would be entitled to recover if he knew there had been obstructions there previously. If he did [not] know there had been obstructions there previously, and he had informed Mr. Murphy in regard to them, and Mr. Murphy had promised to remove them, then determine from the evidence whether he had remained in the service an unreasonable time for that to have been done. If, under the evidence, such time had not elapsed, and he was relying upon the company's promise to remove the obstructions, it would not be an assumption of risk that otherwise would attach to his acts. \* \* \*

"If it was an act that an ordinarily prudent person in that line of business would have done, and you find that his injury



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was not the result of negligence on his part, but was due to the condition of the track, and he was injured in consequence of that condition, and you further find that the plaintiff at the time he was injured did not know of such dangerous condition, or must not necessarily have known it from the performance of his duty, and was injured in consequence of such defective condition, you will find for plaintiff. Or if you find from the evidence that plaintiff had known of such defective condition of the track previously, but if you find from the evidence that Mr. Murphy, immediately before the accident, assured him that this portion of the track had been cleared of the obstructions, and you find that the plaintiff relied upon such assurance, and did not know it to be untrue, and was injured in consequence of an obstruction that he was assured had been removed, and the accident was not due to any misconduct on his part, you will find for plaintiff. Or if you find from the evidence that the plaintiff had previously known of the obstructions near the track, but you further find that Mr. Murphy had promised to remove them, then you will determine from all the circumstances whether or not he had remained in the employ of the company an unreasonable length of time before the accident occurred. Now, on that point, understand me. As I understand the law, wherever there is a defective condition existing, and the employee knows it, and he voluntarily assumes to use it, and is injured, he cannot recover. But if he informs the employer of such defective condition, and the employer promises to remedy that defect and cure it, the party then has the right to remain in the employ a reasonable length of time for the employer to do that act. If he should remain in the employ an unreasonable length of time, and the defect still continues, and he is injured in consequence thereof, he could not recover, because it would be his own negligence in continuing to remain in the employ. The rule is that the employer shall have a reasonable length of time to remedy the defect, and the employee must only remain in the employ a reasonable length of time for the defect to be cured or remedied. Therefore, gentlemen, upon that phase of the case you are instructed that, if you believe from the evidence that Mr. Murphy did promise to remove the obstruction, then you are to determine whether or not Mr. Billingslea had remained in the employ an unreasonable length of time. If he had, and was injured in consequence of such defect, he could not recover. But if you find that it was still a reasonable time that he had the right to remain, under the circumstances, and was not guilty of negligence in remaining such length of time after the promise, in that state of case it would not debar him of the right to recover."

These instructions distinctly advised the jury that although the yard was dangerous for handling and switching trains therein, to and with the knowledge of the plaintiff, yet the plaintiff, by remaining in the employment and in assisting in

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handling the trains and aiding in the clearing up, assumed none of the risks of the dangerous yard and tracks from the time Murphy, the yardmaster, told him he was going to clear it up, and until a reasonable time thereafter to do the work had elapsed, which reasonable time the jury should determine from the evidence. As a general rule, it is the master's duty to furnish a reasonably safe place for his servants to work, but this rule has no application where the very work the servant is employed to do and assist in doing consists in making a dangerous place safe, and particularly where the dangerous character of the place is fully apparent, and known to the servant. *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440; *Railway Co. v. Jackson*, 12 C. C. A. 507, 65 Fed. 48; *City of Minneapolis v. Lundin*, 7 C. C. A. 344, 58 Fed. 525; *Finalyson v. Milling Co.*, 14 C. C. A. 492, 67 Fed. 507; *Porter v. Coal Co. (Wis.)* 54 N. W. 1019; *Bradley v. Railway Co.*, 138 Mo. 302, 39 S. W. 763; *Hathaway v. Railroad Co. (C. C.)* 29 Fed. 489; *Ragon v. Railway Co. (Mich.)* 56 N. W. 612; *Rosenbaum v. Railroad Co. (Minn.)* 36 N. W. 447; *Bennett v. Railroad Co. (Sup.)* 47 N. Y. Supp. 258; *Brick v. Railroad Co.*, 98 N. Y. 211; *Green v. Cross (Tex. Sup.)* 15 S. W. 220. Where the servant, fully apprised of the dangerous character of a place, yard, building, or construction, is employed to assist in clearing up and making the same safe, and works therein for that purpose, he undoubtedly assumes the risks attendant, and in this respect the charge of the court was clearly erroneous.

Now, connected with this erroneous instruction several times repeated, and largely dependent for materiality and relevance upon it, was that part of the instructions as to the effect of the assurance, if any there was, given by Murphy, yard foreman, to the plaintiff, that the yard, or some portion thereof, was clear of obstruction. The evidence that Mr. Murphy, the yard foreman, just prior to the injury of the plaintiff gave assurance as to the safe condition of the tracks, is found in the plaintiff's testimony as follows:

"I told him I had instructions from Mr. Keevey to ask him as to the disposition of the cars. He turned, and told me to place the cars so that the south end would be two car lengths north of the tool box situated about the middle of the yard, is the best of my recollection, and the cars would be all right. He did not want to put any more cars where he was working, because they had finished that portion of the track."

At that time, Mr. Murphy was between track No. 3 and track No. 4 at the switch point on the track No. 3. Further answering:

"Q. When you went to Mr. Murphy, what did he say, if anything, about the yards? A. The reply to me was as to the disposition of the cars, and, furthermore, in my remarks I said, 'You want more cars cut off and brought up,' and he said, 'No, I have finished.' The last car he had placed at his

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disposition was at the place where I was injured. Q. When he said he had finished, what did he mean? A. He meant that everything was in good condition and the track safe. Q. What had been the condition of the tracks at this point and below there? A. Previous to bringing this rock, and a week before, the track had been in a very bad condition. There were refuse rocks piled along the side of the track No. 5."

The judge instructed the jury, always, in connection with the assumed risk, as follows:

"Or, if you believe from the evidence that Mr. Murphy, immediately before the accident occurred, informed Mr. Billingslea that the portion of the track where he was then going to work had been cleared of the obstructions, and Mr. Billingslea relied upon that statement, and did not know it to be untrue in fact, and undertook to perform the work, and without fault on his part was injured, in that state of case the plaintiff would be entitled to recover. \* \* \* If Mr. Murphy had assured him that the yard was clear of obstructions, and Mr. Billingslea did not know to the contrary, and in the discharge of his duty, and without any act of contributory negligence on his part, he was injured in consequence of such defective condition, relying on such promise, he would be entitled to recover if he knew there had been obstructions there previously. \* \* \* Or if you find from the evidence that plaintiff had known of such defective condition of the track previously, but if you find from the evidence that Mr. Murphy, immediately before the accident, assured him that this portion of the track had been cleared of the obstructions, and you find that the plaintiff relied upon such assurance, and did not know it to be untrue, and was injured in consequence of an obstruction that he was assured had been removed, and the accident was not due to any misconduct on his part, you will find for plaintiff."

If the evidence of the plaintiff as to Murphy's assurance that some track, or portion of track, was clear of obstructions, or was finished,—which meant that everything in some locality in the yard was in good condition and the yard safe,—and which evidence is uncertain as to whether the track referred to was where Murphy was (between tracks 3 and 4), where the plaintiff was injured (which was on track 5 near the north end of the same), or, where Murphy told plaintiff to place his train (which was about the middle of the yard),—warranted instructions as to how far the plaintiff had a right to rely upon the assurance of Murphy as to the condition of the tracks, still we think that the instructions as given, stressed as they were, and repeated in connection with the unsound proposition that plaintiff, by continuing to work in assisting in clearing up the yard after he received Murphy's promise that the yard should be cleaned up, assumed none of the risks of the dangerous employment, were incorrect and



misleading because the plaintiff had no right to rely absolutely on the assurance of Murphy as to a plain, patent condition, when, in the discharge of his duty of assisting in cleaning up the dangerous yard, he had equal opportunities with Murphy, in broad daylight, to see and know whether obstructions had been removed or not. The plaintiff was an intelligent man according to his evidence, an expert, as to the condition of railroad yards and tracks, and he was bound to keep his eyes open, and give full use to his senses in regard to patent obstructions. Many of the cases cited *supra* sustain this proposition, but see *Pennsylvania Co. v. Ebaugh* (Ind. Sup.) 53 N. E. 763; *Barnard v. Schrafft* (Mass.) 46 N. E. 621; *Railroad Co. v. Herbert*, 116 U. S. 655, 6 Sup. Ct. 590, 29 L. Ed. 755; *Magee v. Railroad Co.* (Iowa) 48 N. W. 92. The incorrect instructions as to the risk assumed by the plaintiff pending the work of making the dangerous yard safe, and as to the reliance the plaintiff had a right to give to the assurance of Murphy were decidedly prejudicial to the defendants, and, in our opinion, require a reversal of the case.

The judgment of the circuit court is reversed, and the cause is remanded, with instructions to grant a new trial.

#### NORTHERN PAC. RY. v. PERRY.

(*Circuit Court of Appeals, Ninth Circuit, May 5, 1902.*)

[116 Fed. Rep. 609.]

#### Master and Servant—Injury of Brakeman—Defective Appliances.\*

Plaintiff, while employed as brakeman on a freight train on defendant's road, was injured by being knocked from the top of a car by the spout of a water tank which hung down in nearly a horizontal position over the track. There was testimony of several witnesses tending to show that for some weeks before the accident the spout, after being used and released, would not spring back to an upright position, as it was intended to do, and that, after being raised up, it would gradually settle down again. One witness testified that this occurred within an hour previous to the accident: *held*, that such evidence justified the court in refusing to take the case from the jury on defendant's motion, as being sufficient, if believed, to sustain a finding by the jury that the injury did not result from the negligence of fellow servants, but from the defective condition of the spout and its appliances, which had existed for such length of time that defendant would have known of it if it had performed its duty of inspection.

In Error to the Circuit Court of the United States for the Northern Division of the District of Washington.

Lewis G. Perry, the defendant in error, brought an action against the Northern Pacific Railway Company for damages on account of injuries which he sustained on June 24, 1899, by being knocked from one of the trains of the railroad com-

\*See foot-note appended to *Choctaw, O. & G. R. Co. v. McDade* (C. C. A.), 1 R. R. R. 413, 24 Am. & Eng. R. Cas., N. S., 413.

pany. He alleged in his complaint that he was working in the capacity of a freight brakeman upon a fast stock train, and that through the negligence of the plaintiff in error a certain water pipe, used to take water from a tank alongside the main line of the railroad, became disordered, rusty in its pulleys, and disabled, so that the pipe, after supplying a passing engine, was negligently allowed to remain standing out over the track of the railroad, and to hang over the cars of the trains; and that the pipe, after supplying water to engines, would not recoil back to its original position; and that the plaintiff in error negligently continued to permit such pipe to hang over the said track; and that while standing on his train looking backward for signals at a depot which he was passing the defendant in error was struck by the water pipe, and knocked from the top of the train to the ground, whereby he sustained severe injuries. The answer of the plaintiff in error put in issue all the averments which charged it with negligence, and asserted that the pipe was properly constructed, and suitably adjusted, and that it could not, of its own accord, come down from its upright position; that, if it was down from its perpendicular and proper position, it was through the neglect of some fireman or other person. Trial was had upon these issues, and the jury returned a verdict for the defendant in error for \$2,500. At the motion of the plaintiff in error, a new trial was ordered, and upon the second trial a verdict was returned for \$12,000. A second motion for a new trial was denied by the court on condition that a judgment for \$7,500 be accepted by the defendant in error, which was done, and judgment was entered for that amount.

Jas. F. McElroy and B. S. Grosscup, for plaintiff in error.  
James Hamilton Lewis and Thos. B. Hardin, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is contended that upon all the evidence in the case the court erred in denying the request of the plaintiff in error to direct a verdict in its favor on the ground that the injury sustained by the defendant in error was a risk incidental to his employment, and for the reason that there was no evidence sufficient to show negligence upon the part of the plaintiff in error. There is direct evidence to the effect that at the time when the defendant in error was injured the spout was down from its perpendicular position, and was hanging across the track, and that it struck him, and knocked him off the train. The plaintiff in error contends that, conceding these facts, it does not follow that there was negligence upon its part, and that the case lacks direct testimony to the effect that the ac-



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cident occurred through its negligence, and that, in the absence of proof to show that the spout was not left in the position in which it was found by the negligent act of a fellow servant, and in the absence of evidence to show that it did not come down across the track by reason of faulty construction, the case should have been taken from the jury, since it was incumbent upon the defendant in error to point out the facts which constituted the negligence of the railroad company; and that, if the evidence was such as to leave the question of the cause of the injury to conjecture only, it was error to refuse to take the case from the jury. It is not within the province of this court to weigh the evidence which went to the jury. The trial court did not err in denying the motion if there was any evidence to support the allegations of the complaint. We think such evidence is found in the testimony. Jacob Horweg testified that just prior to the accident he saw the approaching train upon which the defendant in error was standing, and observed that the water spout was hanging across the track, and was apprehensive of injury to the defendant in error, and that he looked until he saw him knocked from the train. He testified further that this accident occurred about 6 o'clock, or shortly thereafter; and that a short time before 6, or some time between 5 and 6, he had seen an engine stop at the water tank and take on water, and that the fireman in charge of the engine, after taking water, raised the spout up, and that "it came back slow and stopped"; that he saw the spout shoved clear up, and then come back slowly; that the spout would bump against the tank, and then fall back. He testified that he had seen this a number of times, and that he and his neighbors had discussed this defective condition of the spout, and had predicted that somebody would get hurt. William Mack, an employee of the railroad company, who had used the water spout in watering engines, testified that on one occasion some two months prior to the accident he found the spout hanging over the track, and that he got hold of one of the weights, and pulled hard down to move the spout up to its proper position, another man helping him by lifting the spout; and he testified that the difficulty with the spout was that the weights were too light to pull it back to its proper position, and that, if the weights had been heavy enough, it would have come back to its proper position. Rasmus Sorensen testified that he had noticed the water spout down a short time before the accident, and had commented on the danger of some one getting hurt; that the same day it was put up again, and that five or six days after he noticed it was down again, and noticed the same thing afterward. He stated that on one occasion two firemen, after taking water, seemed to have difficulty in getting the spout back in its position, and that they finally got it up and went away; "but it came back a little, and in ten minutes it had come back two-thirds of the way down."

The plaintiff in error relies upon the admission made by the defendant in error in the reply "that such water spout was so adjusted by cords, weights, and pulleys that the same would not and could not drop from the said perpendicular position alongside of said tank unless the same was drawn down by means of a rope," and contends that by that admission the defendant in error precluded himself from proving any fault or insufficiency in the weights which operated the spout. But the plaintiff in error entered no objection to any of the testimony which was introduced to show these defects. Not all of the evidence of such defects, however, would have been subject to the objection if it had been made. Some of the evidence introduced by the defendant in error was of such a nature that the jury might have found that, while the weights were sufficient to sustain the spout in a perpendicular position after it had been placed in such position, they were defective for the reason that they were not sufficient to carry the spout when pushed upward after having been used for watering purposes, or to hold it upright at any position except the perpendicular.

The plaintiff in error contends that the defect, if any, in the apparatus whereby the spout was operated was latent, and that the evidence falls short of showing that the plaintiff in error had notice of its defects, or that negligence is imputable to it for its failure to remedy the same. The evidence to which we have heretofore alluded is sufficient, we think, if credited—as it must have been—by the jury, to sustain the verdict. It refers to a defective condition of the spout, existing some months prior to the accident, a condition which was observed and commented upon by the witnesses and others, residents of the town of Cheney, where the accident occurred. Sorensen testified that the section foreman on the railroad was present at the time when he and another, with some difficulty, restored the spout to its proper position. The evidence, moreover, in our judgment, is sufficient to have justified the jury in finding that the position of the pipe hanging across the track as it did at the time of the accident was not owing to the carelessness of some fellow servant of the defendant in error who had used the same, but was owing to defects in the operating apparatus, probably induced by time, rust, or wear, and getting out of repair, which prevented the spout from rising to a perpendicular position automatically through its weights, and permitted it, after being pushed up, to return toward a horizontal position. It was observed thus to fall across the track, after having been used and pushed up, within less than an hour previous to the accident. The plaintiff in error owed its employees the duty of properly inspecting its road and all the appliances thereof, and of correcting discoverable defects which might cause injury to the lives or limbs of its employees. *Railway Co. v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766; *Railroad Co. v. Peterson*, 162

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U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994; Railroad Co. v. McDade, 50 C. C. A. 591, 112 Fed. 888; Railroad Co. v. Mortensen, 11 C. C. A. 335, 63 Fed. 530; Railway Co. v. Price, 38 C. C. A. 239, 97 Fed. 423; Dunn v. Railroad Co., 46 C. C. A. 546, 107 Fed. 666.

Upon the whole record we are unable to see that the circuit court erred in denying the motion of the plaintiff in error.

### DE LAY v. SOUTHERN RY. CO.

(*Supreme Court of Georgia, July 19, 1902.*)

[42 S. E. Rep. 218.]

#### Injury to Employee—Defective Appliances—Nonsuit.\*

Though there was evidence showing that the plaintiff was injured by reason of a defect in the implement furnished him with which to work by his master, the defendant, yet, as it did not appear that the latter either knew, or, in the exercise of ordinary care and diligence, ought to have known, of such defect, and it did appear from the plaintiff's own testimony that he had equal means with the master of ascertaining the existence of the defect, the judgment of nonsuit was right. Civ. Code, §§ 2611, 2612.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by R. J. De Lay against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Green & McKinney, for plaintiff in error.

Dorsey, Brewster & Howell and Saunders McDaniel, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

### LOUISVILLE & N. R. CO. v. POINTER'S ADM'R.

(*Court of Appeals of Kentucky, Oct. 16, 1902.*)

[69 S. W. Rep. 1108.]

#### Death by Wrongful Act—Defective Petition—Germane Amendment.

The petition in an action against a railroad company alleged the death of plaintiff's intestate in Virginia in an accident caused by the locomotive on which he was fireman running into an obstruction on the track. Plaintiff afterwards tendered an amendment setting out Code Va. §§ 2548, 2557, 2902-2904, allowing a recovery by the personal representative of one whose wrongful injuries resulted in death, and providing for the apportionment of any damages so recovered: *held*, that the amendment was germane, since it supplied the lacking

\*See generally, foot-note appended to Gorman v. Minneapolis & St. L. Ry. Co. (Iowa), 3 R. R. R. 293, 26 Am. & Eng. R. Cas., N. S., 293.

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element of the cause of action, otherwise sufficiently pleaded in the petition.

**Same—Same—Same—Limitations.**

The amendment was not tendered until more than a year after the accident: *held* that, since the amendment was germane, the action was commenced at the time of the filing of the petition and service of summons, and was within the statute of limitation.

**Same—Same—Same.**

Defendant's answer alleged that only one large rock fell on and obstructed the track. Plaintiff, in the amended petition, admitted this. At the beginning of trial, and after plaintiff had taken the depositions of many witnesses, constituting the bulk of his case, defendant tendered an amendment setting out that it was a large mass of stone and dirt which fell. No good reason was presented why defendant, in possession of the facts by its servants, should not have accurately set out the facts earlier: *held*, that the tender of the amendment was properly rejected.

**Damages—Argument of Counsel.**

Counsel for plaintiff in his closing argument read to the jury an extract from a paper that another jury had rendered a verdict against the company for \$15,000 for the death of a passenger. Counsel was promptly reprimanded by the court, who instructed the jury not to consider the extract. The jury returned a verdict for \$5,000: *held* that, no improper influence having been shown by the verdict, defendant was not prejudiced by counsel's conduct.

**Care Due Employee—Instruction.**

It was not error for the court to use the words "reasonable care," instead of "ordinary care," in an instruction setting out the care required by defendant's servants in the inspection of a cut through which the track ran.

**Damages—Harmless Error.**

The jury were instructed that if they found for plaintiff, the administrator, they might determine what proportion of any damages recovered should go to the father or mother of the deceased. There was some question whether, under the Virginia statute, they were entitled to direct any portion to be given to the mother. A proper instruction as to measure of damages was also given: *held*, that such mention of the mother, even if error, could not be considered to have influenced the jury to consider her needs in fixing the amount of their verdict, and was harmless to defendant.

**Master and Servant—Safe Roadbed—Vice Principal.\***

Under the law of Virginia, the maintaining of a safe roadbed by a railway company is a duty in the performance of which a servant is a vice principal, for whose neglect, resulting in the injury of another servant, the company is responsible, and not a fellow servant.

Appeal from circuit court, Whitley county.

"To be officially reported."

Action by Charles Pointer's administrator against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. Alcorn, for appellant.

C. C. Williams and W. G. Welch, for appellee.

O'REAR, J. Charles Pointer, a fireman on one of appellant's locomotives, was killed 17th March, 1899, in Lee county, Va., by the wrecking of his train. A large rock, or

\*See generally, note, 12 Am. & Eng. R. Cas., N. S., 684; Wright v. Southern Ry. Co. (N. Car.), 20 Am. & Eng. R. Cas., N. S., 873.



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quantity of rock and dirt, slipped from the side of a cut through which the railroad passed, and, not being discovered in time, the train ran into it. The train was derailed, and appellee's intestate was scaled and otherwise injured by the overturning of the locomotive, from which injuries he died. On March 8, 1900, this suit was filed in the Whitley circuit court by his administrator to recover damages for his death; it being alleged that the accident was caused by the negligence of appellant, its agents and servants, in failing to remove the stone and debris from the side of the cut in time to have prevented the slip. It was charged that appellant knew, or by the exercise of ordinary care could have known, of the existence of the danger in time to have averted the accident. The answer denied the negligence charged, and alleged that, instead of being a mass of stone and dirt, there was but one stone that fell, and that appellant had no knowledge or notice of its dangerous condition in time to have prevented its falling, and could not have known it by the exercise of ordinary care. Later, but not within a year of the death of appellee's intestate, appellee tendered an amended answer in which he admitted that there was but one stone that fell, instead of a large mass of stone and dirt. He also charged for the first time that there was a statute of Virginia allowing a recovery for the death of one produced by the negligence of another. The statute was set out in *hæc verba*, and is as follows:

Code, § 2902. "Whenever the death of a person may be caused by the wrongful act, neglect or default of any person or corporation \* \* \* and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action \* \* \* then, and in every such case the person who or corporation \* \* \* which would have been liable if death had not ensued, shall be liable to an action for damages."

Sec. 2903. "Every such action shall be brought by and in the name of the personal representative of such deceased person, and within twelve months after his or her death. The jury in such action may award such damages as to it may seem fair and just, not exceeding ten thousand dollars, and may direct in what proportion they shall be distributed to the wife, husband, parent and child of the deceased."

Sec. 2904. "The amount recovered in such action shall after the payment of costs and reasonable attorneys fees be paid to the wife, husband, parent and child of the deceased, in such proportion as the jury may have directed, or if they have not directed, according to the statute of distribution; and shall be free from all debts and liabilities of the deceased; but if there be no wife, husband, parent or child, the amount so recovered shall be assets in the hands of the personal representative to be disposed of according to law."

Sec. 2557. "When any person shall be intestate as to his



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personal estate or any part thereof, the surplus \* \* \*, after payment of funeral expenses, charges of administration and debts shall pass and be distributed to and among the same persons and in the same proportion, to whom and in which real estate is directed to descend."

Sec. 2548. "When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary of such of his kindred male and female, as are not alien enemies, in the following course: First, to his children and their descendants; second, if there be no child nor the descendant of any child, then to his father."

To the filing of this amendment, appellant objected. The court, notwithstanding, permitted it to be filed. A demurrer to it was overruled. A demurrer was sustained to appellant's plea of limitation of one year interposed in avoidance of it. All these rulings raise but the one question, was the amendment germane to the original cause of action sued on,—therefore relating back to the time of the filing of the original petition, so as to save the running of the statute?

The position of appellant is that the original petition, showing affirmatively that the injury and death occurred beyond this state, and in the state of Virginia, and not stating or intimating that there existed in Virginia a statute allowing a recovery for death, stated no cause of action; that we must presume, in the absence of allegations to the contrary, that the common law, only, is in force in Virginia, where the negligent act and death are laid (*Valz v. Bank*, 96 Ky. 549, 29 S. W. 329, 49 Am. St. Rep. 306); the common law not allowing a recovery for the negligent injury of another resulting in instant death (*Eden v. Railroad Co.*, 14 B. Mon. 204; *Hansford's Adm'r v. Payne*, 11 Bush, 380), and the statute of Kentucky allowing a recovery for such negligent act and consequent death cannot have any extraterritorial force, and cannot, therefore, embrace an act occurring out of the state (*Bruce's Adm'r v. Railroad Co.*, 83 Ky. 174). It is the argument of appellant that an amendment cannot be allowed to state for the first time a cause of action under a statute by way of amendment to a cause of action sued on under the common law. *Gregory v. Railway Co.*, 20 Mo. App. 448; *Bolton v. Railway Co.*, 83 Ga. 659, 10 S. E. 352. The latter case is mainly relied on as an authority most clearly in point. In that case it was said: "Whenever a suit is commenced in this state, and the plaintiff relies for his right of action and his recovery upon a foreign statute, he must plead said statute. If he pleads it defectively, or shows in some way that he relies upon it, he will be entitled, under our Code, to amend by setting out the statute. \* \* \* If, however, he commences his action and relies upon his common-law right, we do not think he can amend his common-law declaration by setting out the statute," etc. We find ourselves unable to

agree entirely with the learned Georgia supreme court. Aside from the criticism of this case in Maxw. Code Pl. 579, that application of the rule as affecting amendments does not satisfy our conception of the spirit of code pleading, nor does it appear to be supported by other authority. It is truly said that, unless there was a statute allowing a recovery in this case, then no recovery could be had; for the common law allowed none. The cause of action, however, was not the statute, but the negligent act causing the death sued for. The proper parties appear. The one entitled in fact to bring this suit does so. The cause of the accident, the negligence, its result, and the pleader's claim for relief are all set forth. Each of these statements is equally with every other one essential to the right of recovery,—neither less nor more so than the allegation of the existence of the Virginia statutes. If the injury had occurred in this state, of course, the statute need not have been pleaded. But foreign statutes conferring rights must be pleaded, as any other necessary fact upon which the recovery may be based. *Valz v. Bank*, 96 Ky. 549, 29 S. W. 329, 49 Am. St. Rep. 306; *Templeton v. Sharp* (Ky.), 9 S. W. 507, 696. The plaintiff was attempting to set forth in this petition his cause of action against appellant. Not a cause that did not exist (at common law), but the one that did exist, and that necessarily must have been based upon some statute. He alleged a number of essential facts, but omitted one. By this amendment he supplies the one omitted. This does not change the parties, nor the nature of the action, nor the cause of it. It merely perfects that which before was imperfect for lack of that averment. Such is the proper office of all amendments. A true test whether they are germane to the original cause of action attempted to be set out is, would a recovery upon the original action have been a bar to a suit upon the one set out in the amendment?

But it is argued that, as no cause of action was stated in the petition, there was nothing to amend by. And as there was no cause of action stated till the amendment was filed, it was really the beginning of the suit, at which time limitation had become a bar. This much may be said, in one sense, of all necessary amendments. A plaintiff will not be allowed to amend his cause of action by changing it. The office of the amendment is to perfect or complete that which is begun, but is incomplete. "The Civil Code, with a view to a trial upon the merits and the attainment of justice, allows great liberality in this respect, and the lower court should not be controlled in the exercise of power unless it be manifestly abused." *Filbin's Adm'r v. Railroad Co.*, 91 Ky. 446, 16 S. W. 92; *Greer v. City of Covington*, 83 Ky. 416. As to what will form a basis as a sufficient statement of the original cause of action, upon which perfecting amendments will be allowed, the courts have had numerous instances before them. In *Ellison v. Railroad Co.*, 87 Ga. 710, 13 S. E. 813, that court

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has again passed upon this question. We construe this case as overruling *Bolton v. Railway Co.*, 83 Ga. 659, 10 S. E. 352, the two being in conflict. In the case of *Ellison* the court undertook a more exhaustive review of the doctrine of amendments under the Code, and took occasion to say: "The case of *Martin v. Railroad Co.*, 78 Ga. 307, is overruled, and so is any and every other case, in so far as the judgment of affirmance or reversal rests upon the construction herein reviewed and disapproved." The court then proceeded to lay down the rule below, which is fairly and well stated: "There must be some trace of a particular cause of action in the declaration, in order that it may contain enough to amend by. \* \* \* When a cause of action appears in a declaration, that, and that only, is the one which the pleader is supposed to have designed. When none appears, the design is to be sought in the light of what is alleged in the declaration, compared with what is alleged in the proposed amendment. If the two sets of allegations harmonize so as to be parts of one and the same sufficient design, and so as to fill out that design and render it as complete on paper as the law requires it to be, the amendment is germane, and must be allowed. \* \* \* The least amount of substance in a declaration, which will serve to show that what is offered to be added rightly belongs there, is enough to amend by, if the addition proposed would make the cause of action complete." If the original and amended petition form the right of plaintiff to relief on different or inconsistent titles or grounds, or upon entirely inconsistent claims, arising out of different states of fact, the amendment would not be germane. The supreme court of New York, applying a Code provision almost identical with ours (section 134, Civ. Code), in a case where the plaintiff had failed to set out a foreign statute giving the right of recovery, allowed an amendment pleading the statute. *Lustig v. Railroad Co.*, 65 Hun, 547, 20 N. Y. Supp. 477. Also, see *Chander v. Transfer Co.* (City Ct. N. Y.) 13 N. Y. Sup. 573; also *Davis v. Railroad Co.*, 110 N. Y. 646, 17 N. E. 733. *Railway Co. v. Foster* (Tenn. 1882) 11 Am. & Eng. R. Cas. (O. S.) 180, was a case involving, in one sense, this question. That suit was in Tennessee. It developed that the accident had occurred in Alabama. Plaintiff was allowed to amend and set up the statute of Alabama allowing the recovery. In that case the statutory period of limitation for bringing the action had not run when the amendment was tendered. Counsel for appellant seeks to distinguish this case on that ground. We fail to perceive wherein it is not authority. For the question is, is the amendment germane to the original cause of action? If it is, then the question of limitation necessarily will be referred to the time of the "commencement of the action." In *Bank of Louisville v. Board of Trustees of Public Schools*, 83 Ky. 219, the action was brought under a statute (the act of April, 1882) providing that certain deposits, where the depositors



had not been heard of for eight years, and had not exercised any act of ownership over them, should escheat to the commonwealth for the benefit of public schools of the city of Louisville. An amendment was allowed that sought to recover these deposits as escheats on a different statutory ground, viz., that the depositors had died without heirs or distributees. To the same effect, see *Railroad Co. v. Case's Adm'r*, 9 Bush, 731.

We are of opinion that the amendment in the case at bar was germane to the original cause of action; that the filing of the petition, and issual of the summons thereon, was the commencement of this action (Code, § 39); and that the period of limitation fixed by the Virginia statute had not then run. The court's ruling was proper, both as to filing the amendment, and sustaining the demurrer to the plea of limitation filed to it.

Appellant offered to file at the beginning of the trial an amended answer in which it averred that the accident was caused, not by the falling of one large rock, but by a slip in the side of the cut of a large mass of rock and dirt. The court refused to permit this amendment, and of that ruling appellant makes serious complaint. As has been stated, the accident occurred in Lee county, Va., and the trial was had in Whitley county, Ky., probably more than a hundred miles distant. Appellee, in the development of this case, had taken the deposition of a dozen or more witnesses living in the vicinity where the accident occurred; this evidence constituting the bulk of appellee's case. The evidence was taken upon the issue as then formed, and as it had stood for some time. To allow its change at the beginning of the trial was to have practically destroyed the evidence taken on this point. At least, it would have necessarily resulted in a further postponement of the trial. In *Eskridge's Ex'rs v. Railway Co.*, 89 Ky. 367, 12 S. W. 580, in the original petition it was stated that the injury was caused by the negligence of those in charge of the south-bound accommodation train, but in the amended petition filed before answer it was stated to have been caused by the willful negligence of the servants of appellee in charge of the south-bound express train, which passed before the other; and one of the alleged errors was the refusal of the court to permit the plaintiff to file a second amended petition, in which it was stated, as in the original, that the south-bound accommodation train caused the injury. The motion to file the last-named pleading was made after the jury as sworn and some witnesses had testified. The court overruled the motion, and this ruling was affirmed on appeal. The court used this language: "For, the issue having been made up and partly tried as to negligence of those in charge of the express train, it would have been obviously prejudicial to the defendant to allow it then changed." It seems to us that the two cases are so nearly parallel in point of circumstance and reason that the

one cited must be held conclusive of the proper practice in the one at bar. It would have been not only manifestly unjust to appellee to have allowed a change of the issue at that late date, but there is not a sufficient reason shown why appellant might not have accurately set out the facts either in its original answer or earlier. Its servants and agents in charge knew, as a matter of fact, and within a few hours of the occurrence, exactly whether it was a large mass of rock or the falling of a single rock that caused the wreck. And while it may not have been the fault of counsel that he was not earlier apprised of this true state of affairs, yet it necessarily was the fault of his client that he was not so apprised.

In the concluding argument to the jury, counsel for plaintiff read to the jury a statement published in a daily newspaper that within a day or two previous to the trial a jury in another county in this state had rendered a verdict against the same defendant for \$15,000 for the death of a passenger,—Mrs. Carothers. This conduct was objected to by appellant's attorney. The court promptly reprimanded counsel making the argument, and explicitly charged the jury that it was improper, and that they should not consider it in forming their verdict in this case. While it may be true that there might exist a state of case where such an improper digression by counsel in the closing argument may have had its hurtful effect, and be beyond the power of the court to remedy by its cautioning charge, and that in such state of case this court would not be authorized to speculate as to the probable effect of the improper matter, but would order a new trial (*Coal Co. v. Sneddon*, 98 Ky. 686, 34 S. W. 228), yet we do not regard such to have been the result, or even the probable result, in the case at bar. The verdict returned by the jury (\$5,000) as compensation for the destruction of life and the power of the decedent to earn money (he being a young man, about 22 years of age, in good health, and earning \$60 or \$75 per month) shows of itself that the jury were not improperly influenced, or influenced at all, by the matter referred to. The only improper effect of the newspaper article would have been to incite the jury to have rendered an excessive verdict. The verdict in this case is not excessive, and is not claimed to be. We fail to see that appellant was prejudiced by the proceeding in question.

A part of the instructions given to the jury, of which complaint is made, is as follows: "If you believe from the evidence that at the time the accident occurred, resulting in the death of Charles Pointer, said stone was unsafe, dangerous, and liable to fall, and that the section foreman knew, or by the exercise of a reasonable care and prudence in the inspection of the cut could have known, that the same was in such dangerous and unsafe condition in time to have removed same before the injury to Pointer," etc. The criticism of the instruction is that the court used the words "reasonable care"



instead of "ordinary care." In the argument, counsel admits that the terms are, in law, practically synonymous. In their ordinary use, in connection with the subject in hand, they are also substantially synonymous. It cannot be that the jury could have been misled thereby to have found that the railroad company was required to use more than ordinary care because it was required to use reasonable care. Ordinary care is reasonable care. If ordinary care were less than reasonable care, it would be rejected by the courts as the standard of conduct of those charged with the duty imposed upon appellant as an operator of a steam railway, for the courts would not permit such a one to escape liability upon the exercise of less than what would be reasonable care toward those in its employ. The terms are used as synonymous or interchangeable in many of the cases. See cases collected 12 Am. & Eng. Enc. Law (2d Ed.) p. 912.

Another objection to the instructions is that they say to the jury, "if you find for the plaintiff, you may say in your verdict what proportion of the sum so found shall go to the father or mother of the deceased." This instruction, of course, was predicated upon the Virginia statute, *supra*, which provides that, in case of the intestacy of the decedent without wife or issue, the recovery should "be apportioned to the parent in such proportions as the jury may have directed." Under section 2548 of the Virginia statute, *supra*, it was shown that if there was no child, nor the descendant of any child, then the estate was to go to his father. Appellant insists that including the intestate's mother in this instruction was improper and prejudicial, because it permitted the jury to consider her claims and possible necessities, etc., and that they likely did so in estimating their verdict. It should be noted, however, that the court restricted the jury, in the first place, that, if they found for appellee, they should "find for him such a sum in damages as you may believe from the evidence will fairly compensate him for the loss of the life of his intestate, Charles Pointer; and you may measure such damages by the ability of the deceased to earn money, taking into consideration his age, physical condition, mental capacity, and prospect of life, as they appeared in evidence, provided that the finding shall not exceed ten thousand dollars." If the jury obeyed the instructions of the court, as it was their duty to do, and as they did, so far as anything in this record discloses, they were not at liberty to take into consideration the fact of decedent's having a mother alive, or of her needs or requirements, in estimating the size of the verdict. But after the compensation had been agreed upon, as defined by the instruction, then the jury were permitted by the further instruction of the court to apportion the sum so found among certain persons, to wit, the father and mother of the decedent. If this was error, it affected the father alone, or possibly the funeral creditor of the deceased. As no objection comes from either of these

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sources, we cannot see that appellant is prejudiced by the form of the instruction.

The remaining question for decision is upon appellant's plea that under the laws of Virginia, where the accident occurred, and by which, of course, the recovery must be regulated, the deceased and section foreman or track repairer were fellow servants; that the law of Virginia did not allow one servant injured by the negligence of a fellow servant to recover therefor from the master. The following cases were used in evidence below, and are referred to, as embracing the law of Virginia upon that subject: *Moon's Adm'r v. Railroad Co.*, 78 Va. 745, 49 Am. Rep. 401; *Railroad Co. v. Nuckol's Adm'r*, 91 Va. 193, 21 S. E. 342; *Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Railroad Co. v. Houchins' Adm'r*, 95 Va. 399, 28 S. E. 578, 46 L. R. A. 359, 64 Am. St. Rep. 791; *Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614. The law upon this vexing question, as it is applied in Virginia, according to the opinions in the cases, *supra*, delivered by the supreme court of appeals of that state, is far more liberal to the master than obtains in this state and some other jurisdictions. It is not our purpose, however to enter upon a criticism or an analysis of the reasons for this distinction. It exists probably as much in policy as in principle. In the *Moon Case*, 78 Va. 745, 49 Am. Rep. 401, a brakeman upon a train was injured by the negligence of a track repairer, in having the track in defective condition, so as to wreck the train. The brakeman was allowed to recover. The court held that: "Where a person is placed in charge of the 'construction or repair of machinery,' or 'dispatching of trains,' the 'maintenance of way,' etc., he is not a fellow servant with those under him, nor with those in a different department of the company's service. He is the agent of the company, which has assumed, through him, the performance of duties which are absolute and imperative, the omission or the negligence of performing which the law will in no wise excuse." In the *Nuckol Case*, which seems to have been one thoroughly considered by the court, wherein it entered upon a re-examination of numerous previous decisions of that court bearing on this subject, *Moon's Case*, *supra*, was approved, although the court was then inclined to the opinion that the former case should have been rested upon the negligence of the company in failing to provide a safe and suitable track, rather than upon the negligence of the track keeper in failing to give a signal to the approaching train. The *Nuckol Case* was followed and approved in *Ford's Case*, 94 Va. 627, 27 S. E. 509. *Moon's Case*, as interpreted in the opinion in *Nuckol's Case*, *supra*, was approved in the *Houchins Case*, 95 Va. 399, 28 S. E. 578, 46 L. R. A. 359, 64 Am. St. Rep. 791. The Virginia court does not seem to recognize degrees or grades of service in which servants may be employed as affecting the master's liability for their negligence to their fellow servants, but rests

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that liability upon the nature of the employment in which the servants may be engaged, without respect to their grade. In those matters wherein the duty was peremptorily that of the master, as, for example, furnishing safe machinery or appliances, and, in case of railway companies, safe roadways, and in maintaining same, that court holds to the doctrine that these are the master's duties, and cannot be delegated, and that, when performed by his servant, the servant so doing them is a vice principal, and for his neglect, from which an injury results to another servant of the master, the latter may recover from the principal. Such was the finding of the circuit court in this case as to the law of Virginia.

The verdict is fully sustained by the evidence and pleadings. Judgment affirmed, with damages.

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(*Supreme Court of Tennessee, May 24, 1902.*)

[69 S. W. Rep. 317.]

## Death of Engineer—Res Adjudicata.

An action against a railroad company for the death of one of its engineers through the alleged negligence of a local telegraph operator was removed to a federal district court, where plaintiff obtained a judgment, which was reversed on appeal, and the case remanded, on the ground that deceased and the telegraph operator were fellow servants; but, before the conclusion of the second trial in the district court, plaintiff took a nonsuit, and thereafter sued on the same cause of action in a state court other than the one in which the first action was brought: *held*, that the decision on the appeal in the former case was not res adjudicata, and did not bar the second action.

## Law of the Case—Fellow Servants—Trainmen and Telegraph Operators.\*

Neither was the decision on the appeal in the first action the law of the case in the second, but the court was free in the second action to apply the rule established by state decisions,—that trainmen and railroad telegraph operators are not fellow servants.

## Death of Husband—Elements of Damage.†

A widow's loss of her husband's aid, other than pecuniary, such as aid of advice and counsel, and her loss of the comfort and enjoyment of his society, are not elements of damages in an action for his wrongful death.

## Appeal—Review—Damages.

Where, in an action for death, the court commits affirmative error in instructing the jury to consider improper elements of damage, the appellate court will not, in passing on an assignment of error to such instruction, consider whether the damages actually awarded fall short of the damages properly allowable, but will remand the cause.

Error to circuit court, Madison county; Levi S. Woods, Judge.

Action by Isabella Bentz against the Illinois Central Rail-

\*See *Felton v. Harbeson* (C. C. A.), 20 Am. & Eng. R. Cas., N. S., 131, and foot-note.

†See *Walker v. McNeill* (Wash.), 11 Am. & Eng. R. Cas., N. S., 738, and notes, 750 et seq.



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road Company. Judgment for plaintiff, and defendant brings error. Reversed.

C. G. Bond, for plaintiff.

Hays & Biggs, for defendant.

BEARD, J. Ed Bentz was engineer on freight train No. 84, which left Jackson at 2:40 o'clock on the morning of the 10th of June, 1897, destined for Mounds, Ill. The train approached Milan about 4:20 a. m. There the engineer blew for the semaphore signal, which was set at red, and failed to receive the white signal in reply. Advancing his train still nearer, he blew again, when, according to the evidence of plaintiff below, the red signal turned to white. This, under the rules of the railroad, indicated that there were no orders for him, and that the track was clear for him to go ahead. Upon receiving this signal he moved his train north, and while running at a moderate speed around a curve of the railroad, about 5:20 a. m., at a point north of Idlewild, he had a head-end collision with train No. 81, moving south. When this collision was clearly inevitable, Bentz jumped to save his life, and in doing so received mortal injuries, from which death ensued. This suit was brought by his widow to recover damages for his death, which is attributed in the declaration to the negligence of the railroad company. The act of negligence complained of is that at 4:37 a. m., after train No. 84 had passed Milan, the train dispatcher of plaintiff in error at Jackson, whose duty it was to regulate the movement of its trains, inquired of its local operator at Milan as to whether Bentz's train had passed that point, and the operator at Milan replied that it had not, and, acting on this information, the train dispatcher gave an order to the south-bound train, No. 81, then at Martin awaiting orders, to meet north-bound train, No. 84, at Idlewild, and at the same time gave the same order to the Milan operator to be delivered to train No. 84 when it reached that point. Train No. 81 received this order, and was on its way to Idlewild when the collision occurred; but train No. 84 did not, as the order reached Milan a few minutes after No. 84, in answer to the white light displayed on the semaphore, had passed that point. This semaphore was under the control of this operator, and its movements were regulated by a rope which passed from it into the office occupied by him. There were a verdict and judgment for the plaintiff below, and the case has been brought to this court by the defendant company.

A number of errors are assigned upon the action of the trial court. The first of these is that, upon motion of the plaintiff below, the court struck out a plea in which the defendant averred that prior to the bringing of the present suit the plaintiff, Mrs. Bentz, had brought her action against the defendant in the circuit court of Madison county, in this state, seeking to recover damages for the same cause of action that

this suit was instituted for; that therefore the defendant, under the act of congress in such case made and provided, had that cause removed to the United States circuit court for the Eastern division of the Western district of Tennessee; that in said court, upon an issue involving the question of liability of the defendant for the same act of negligence herein alleged, and the injury consequent therefrom, there was a trial, and a verdict in favor of the plaintiff; that, on a writ of error prosecuted from the judgment thereon to the United States circuit court of appeals, sitting at Cincinnati, Ohio, that court adjudged that the jury, on the facts of the case, "because the injury occurred through the negligence of a fellow servant (the telegraph operator at Milan) of the plaintiff's husband, should have been directed to bring in a verdict for the defendant," and thereupon reversed the judgment of the lower court, and remanded the case for a new trial; that a mandate issued to the circuit court for a new trial in accordance with this adjudication; and that in the midst of the trial so ordered, and before its conclusion, the plaintiff, over the objection of the defendant, was permitted to take a nonsuit, and thereafter instituted the present action. Upon this state of facts, it was averred, the matters involved had been conclusively adjudicated against the plaintiff. Was the court in error in striking out this plea? While in the plea this action of the United States circuit court of appeals is alleged to be res adjudicata of the question of the railroad's liability to the defendant in error for the loss resulting from the negligence of the telegraph operator and manager of the semaphore, yet in the argument of counsel in support of the assignment of error the claim is somewhat abated, and it is now insisted that its legal effect is that, upon the reopening of the facts between the same parties in the state courts, it is the law of the case; that, while not a bar to the action, it is conclusive upon the parties, so far as the question of liability rests upon the alleged negligence of the operator. Many authorities are relied upon for this contention, but, so far as our examination has extended, they do not support it. Among them are some like *Supreme Lodge v. Lloyd*, 46 C. C. A. 153, 107 Fed. 70, and *Collins v. Insurance Co.*, 91 Tenn. 432, 19 S. W. 525, where the court has held that the principles announced upon the first appeal constitute the law of the case upon a second appeal. However sound this rule is when applied to a suit that has once had the law declared in it by an appellate court, and is remanded, and, after a second trial in the court below, once more reaches the court of appeals, we do not see upon what grounds it is to be made to apply, after a voluntary dismissal by the plaintiff, to a new suit instituted in an independent forum. Nor do we think that *Jacobs v. Marks*, 182 U. S. 583, 21 Sup. Ct. 865, 45 L. Ed. 1241; *Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619; *Pittsburgh, C., C. & St. L. R. Co. v. Long Island Loan & Trust Co.*, 172 U.



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S. 493, 19 Sup. Ct. 238, 43 L. Ed. 528; and *Crescent City Live Stock Co. v. Butcher's Union Slaughter House Co.*, 120 U. S. 141, 7 Sup. Ct. 472, 30 L. Ed. 614,—furnish any aid to this contention. It is unnecessary here to enter upon an analysis of these cases. It is sufficient to say that they are clearly distinguishable from the one at bar. On the other hand, *Bucher v. Railroad Co.*, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795, and *Gardner v. Railroad Co.*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107, if not in express holding, at least by clear intimation, are contra to the view pressed by plaintiff in error. In the first the plaintiff had sued in the state court, and recovered a judgment, which on appeal to the supreme court was reversed, and the case remanded for a new trial. The plaintiff then took a nonsuit, and brought a new suit for the same cause of action, and against the same defendant, in a United States court. The action was one for personal injuries received while the plaintiff was traveling on Sunday in violation of a Massachusetts statute. It was insisted that the holding of the supreme court of that state that the plaintiff was not at the time of his injury traveling from necessity or charity on the Lord's day, but on secular business, was an estoppel on him in the United States court, notwithstanding the subsequent nonsuit. But this insistence was not sustained, and in regard to it Judge Miller, delivering the opinion of the court, said:

"It is not a matter of estoppel which bound the parties in the court below, because there was no judgment entered in the case in which this ruling of the state court was made; and we do not place the correctness of the determination of the circuit court in refusing to permit this question to go to the jury upon the ground that it was a point decided between the parties, and therefore *res adjudicata* as between them in the present action, but upon the ground that the supreme court of the state in its decision had given such a construction to the meaning of the words 'charity' and 'necessity,' in the statute, as to clearly show that the evidence offered upon the subject was not sufficient to prove that the plaintiff was traveling for either of these purposes."

This paragraph from the opinion of Miller, J., is embodied in that of Fuller, C. J., in *Gardner v. Railroad Co.*, *supra*. The opening statement of the chief justice in this last opinion is sufficient to our present purpose: "Counsel for plaintiff in error does not contend that the judgment of the supreme court of Michigan operated as a bar to this action, but he insists that that judgment precluded the plaintiff from successfully maintaining a new action against the defendant upon evidence tending to prove only the same state of facts which the evidence before the supreme court of the state tended to prove." "This," continued the court, "assumes a final adjudication on matter of law, binding between the parties, and, treating the judgment reversing and remanding the cause

as final, applies it as an estoppel, notwithstanding the fact that a nonsuit was subsequently taken. We cannot concur in this view. \* \* \* We think, on principle and authority, a nonsuit decides nothing, but leaves the parties as they began their litigation,—at arm's length. "Under no circumstances," says Mr. Freeman in his work on Judgments (volume 1, § 266), "will a judgment on nonsuit be deemed final." Leaving the controversy indeterminate between the parties, it not only cannot support the plea of *res adjudicata*, but the reasoning and opinion of the court in reversing cannot have the effect of binding in subsequent litigation as the "law of the case." *Fisk v. Parker*, 14 La. Ann. 491. It was with this view that this court, speaking through McAlister, J., in *Hooper v. Railroad Co.*, 106 Tenn. 28, 60 S. W. 607, 53 L. R. A. 931, quoted approvingly from *Gassman v. Jarvis* (C. C.) 100 Fed. 146, as follows: "When a cause of action removed into a court of the United States is dismissed therefrom without a trial or determination of the merits, the right of action still remains in full force and vigor, unaffected thereby; and the party having such right of action may bring suit thereon in any court of competent jurisdiction, the same as though no previous suit had been brought." This being the effect of the nonsuit in the United States circuit court, it left the trial court in the present action free to apply the rule well established in this state,—that the negligence of a railroad telegraph operator is not one of the risks the trainmen assume, as they are in no legal sense fellow servants. *Railroad Co. v. De Armond*, 86 Tenn. 73, 5 S. W. 600, 6 Am. St. Rep. 816; *Railroad Co. v. Jackson*, 106 Tenn. 438, 61 S. W. 771. It follows, therefore, that this assignment of error must be overruled.

An assignment is made upon the following paragraph of the trial judge's charge:

"You also look to the loss of the aid— I don't mean pecuniary aid, but the aid of advice and counsel that the plaintiff, Mrs. Bentz, has sustained by virtue of his death; and also look to the loss of comfort and enjoyment that she has lost as a result of his death,—look to the comfort and enjoyment of his society. Now, these are the elements of damages to be considered by the jury in determining what amount of damages to allow her if you find in favor of the plaintiff." We think this error is well assigned. In *Railroad Co. v. Wyrick*, 99 Tenn. 509, 42 S. W. 434, it was said that under chapter 186 of the Acts of 1883, which in terms provided for a recovery of "damages resulting to the parties for whose use and benefit the right of action survives, from the death consequent upon the injuries received," the widow could only recover her pecuniary loss on the death of her husband; and that case was reversed because the trial judge had said to the jury, upon the measure of damages, that they could look to the mental and physical suffering of the surviving widow.

Proffitt v. Missouri, etc., Ry. Co. of Texas

The court there quoted approvingly from the opinion of Sharswood, J., in *Railroad Co. v. Butler*, 57 Pa. 335, in which it is said that solatium for distress of mind is not a proper element in fixing the amount of the survivor's personal loss. In the present case the learned trial judge, evidently by an advertence, excluded from the jury all consideration of the widow's pecuniary loss, and told them "to look to the loss of comfort and enjoyment" sustained by her from the negligent, fatal injury, if such it was, to her husband. It is insisted, however, that, though this be error, yet there should be no reversal of this case, as, upon the facts disclosed, it is evident that the amount of damages allowed by the jury falls short of the value of the life of the deceased. This may be true, yet we find this affirmative error in the record. It is impossible for this court to say how much, if anything, was allowed for the loss of the enjoyment of her husband's society. There is no basis for speculation, even if we were inclined to so indulge ourselves. In addition, the matter of estimating damages upon a legal basis was for the jury, and we do not feel at liberty to usurp their function.

Other assignments of error were made, and these have been disposed of orally.

The result is that for the error indicated the judgment is reversed, and the cause remanded for a new trial.

# PROFFITT v. MISSOURI, K. & T. RY. CO. OF TEXAS.

(*Supreme Court of Texas, June 16, 1902.*)

[68 S. W. Rep. 979.]

Master and Servant—Personal Injuries—Negligence—Evidence—Trial—Question for Jury.\*

Plaintiff, an unskilled laboring man, was assisting in removing from a building a boiler which extended through a brick wall, so that the wall had to be "punched out" in order to let the boiler through. Plaintiff had seen two other boilers removed in the same way, and had never worked at brickwork, and did not know that the wall was defective, or the work dangerous; and in assisting in punching out the wall it fell, and injured plaintiff: *held*, that it was error to direct a verdict for defendant.

Error to court of civil appeals of Fifth supreme judicial district.

Action by J. T. Proffitt against the Missouri, Kansas & Texas Railroad Company of Texas. Judgment for defendant, and plaintiff brings error. Reversed.

\*As to the master's duty to furnish safe place to work, see *Norfolk & W. Ry. Co. v. Cromer's Adm'r* (Va.), 23 Am. & Eng. R. Cas., N. S., 720, and foot-note, 721 et seq.

As to the master's duty to instruct and warn inexperienced and ignorant employees, see *Louisville & N. R. Co. v. Miller* (C. C. A.), 19 Am. & Eng. R. Cas. N. S., 500, and notes, 506 et seq.

Hazlewood & Smith and Wilkins & Vinson, for plaintiff in error.

T. S. Miller and Head & Dillard, for defendant in error.

BROWN, J. Proffitt had been in the employ of the railway company for about one year and eight months, working about the shops at Denison, "doing most anything," for \$1.25 per day. On the 27th day of July, 1900, he was assisting in removing a stationary engine out of a building which was about 20 feet high, with a flat roof, the walls being of brick. There had been three stationary boilers in the building, two of which had been removed a few days prior thereto. These boilers projected through the wall of the building, there being about six or eight feet on the outside, and the dome and fire box being on the inside of the building. To remove the boiler, the dome and fire box were first removed, when the boiler was jacked up, and put on rollers, so that it could be moved out of the building. The brick in the wall of the building rested upon the boiler, and had to be "punched out" in order to give space through which the boiler could be removed. The gang foreman, Tally, was present during the work, and directed plaintiff and the other hands what to do and how to do it. Plaintiff had been present and assisted in removing the other boilers, and had been at work on the day of his injury about 30 minutes. From the space in the wall from which one of the boilers had been removed bricks had fallen out, and others were loose, so that a brace was placed there in order to sustain the bricks. The plaintiff had been engaged knocking out some of the brick with a sledge hammer, when another employee got up on the boiler, and began to punch the brick out with a piece of pipe, from which plaintiff got dirt in his eyes, and stepped back from the work. Just at this time, the wall gave way, and the roof and a part of the wall fell in, whereby Proffitt received his injuries. Plaintiff had never worked at brickwork at any time, except to assist in putting up one smokestack; and he did not know that the wall was defective in any way, or that the work was dangerous; but he could see the openings from which the boilers had been removed, and also the door in the wall about the same place. The case was tried before a jury, and the trial judge instructed the jury to return a verdict for the defendant, which was done, and judgment entered accordingly. The court of civil appeals affirmed the judgment of the district court.

Under the evidence, the jury could have found that the railroad company negligently failed to provide a safe place for plaintiff to perform his work, or to adopt such rules and measures for performing the work as might have protected the plaintiff from injury while engaged thereat. The evidence is not of that conclusive character that would authorize this court to hold, as a matter of law, that the plaintiff assumed



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the risk of injury from doing the work; therefore the trial court erred by instructing the jury to return a verdict for the defendant, and the court of civil appeals erred in affirming the judgment of the district court.

It is ordered that both judgments be reversed, and that this cause be remanded.

**BIBBER-WHITE CO. v. WHITE RIVER VAL. ELECTRIC R. CO.  
et al. (JOSE PARKER & CO., Intervening Creditors).**

(Circuit Court of Appeals, Second Circuit, April 22, 1902.)

[115 Fed. Rep. 786.]

**Appeal—Final Decision—Order Fixing Priority of Receiver's Certificates.**

An order of a circuit court authorizing a railroad receiver to issue certificates, and providing that they shall be prior in lien to a mortgage indebtedness or to certificates previously issued, is a final decision in such sense as to be appealable.

**Railroad Receivers—Authorizing Completion of Road—Postponement of Existing Liens.**

It is an unwarranted exercise of power by a court of equity to authorize its receiver to issue certificates for the purpose of completing a railroad, and to make the same a first lien on the road without giving the bondholders an opportunity to be heard, where the property is worth no more than the amount of the outstanding mortgage bonds, so that such holders are the equitable owners.

**Same.**

The power to postpone existing liens to liens created by the court for the purpose of completing an unfinished railroad should not be exercised unless it can be done without ultimate loss to existing lienholders. In any case, it should be exercised with great caution; and where only one-third of a railroad was built at the time of the appointment of a receiver, and its value does not exceed the amount of the liens against it, the court is not warranted in authorizing the receiver to complete the road, and to issue certificates in payment, to be a first lien, over the objections of the lienholders.

**Appeal from the Circuit Court of the United States for the District of Vermont.**

See 110 Fed. 472, 473, 111 Fed. 36, 1004.

W. B. C. Stickney and Arthur H. Wellman, for appellants.  
George D. Mumford, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. Error is assigned of an order of the circuit court of the United States for the district of Vermont entered August 7, 1900, authorizing the receiver of the White River Valley Electric Railroad Company to create a new issue of receiver's certificates to be used in the completion of the railroad of that company, such certificates to be a prior lien over certain certificates previously issued by the receiver pursuant to authority from the court. The facts which led to the making of the order were these: A bill of complaint was filed in February, 1900, by one of the unsecured



creditors of the railroad company, asking, among other things, for the appointment of a receiver, with power to operate, repair, and complete the unfinished railroad of the defendant. The bill alleged the insolvency of the defendant; that its railroad was partially completed, and being operated over a portion of its length; that there were outstanding \$120,000 bonds of the defendant, of an authorized issue of \$250,000, secured by a mortgage deed covering all its property; that the bonds were held by various persons as collateral security for loans to the defendant amounting to some \$60,000; that \$88,000 of these bonds were held by Jose Parker & Co., as collateral security for \$44,000 of notes of the defendant; that the towns through which the said railroad was to run had subscribed subsidies amounting to \$55,000, conditioned upon the completion of the railroad by December 30th next ensuing; that the defendant had unsecured indebtedness amounting to \$125,000; that it had become impossible for the defendant to borrow money to complete its obligations or continue the work, and some attachments had been made and others threatened; that if its outstanding bonds should be defaulted, and the property should be sold under the mortgage, it would bring a nominal sum only; and that if the outstanding bonds could be recovered, and the road completed so as to save the town subsidies, the property could be saved, and the creditors of the defendant be paid. The defendant answered, admitting the allegations in the bill of complaint, and submitting to the judgment of the court in respect thereto. Thereupon, and upon the 20th day of February, 1900, the court appointed a receiver, with power to maintain and operate the railroad, and authority to complete and equip the same; and for that purpose, and for the purpose of recovering the outstanding mortgage bonds, to issue receiver's certificates in the sum of \$170,000, \$70,000 of which were to be applied for the recovery of said bonds, and the balance for the completion of said railroad, said certificates to be a first lien upon all the property of the defendant of every kind. The present appellants, Jose Parker & Co., bankers, and holders of some of the outstanding mortgage bonds, intervened, and became parties to the action. The receiver issued some \$60,000 of certificates, and exchanged them with holders of first mortgage bonds of about that amount, including Jose Parker & Co. He then endeavored to make contracts for the completion and equipment of the railroad, but found that no responsible contractor was willing to undertake the work for the certificates in the form and amount authorized. Thereupon the receiver moved the court for a modification of the previous order so as to permit him "to make reasonable and necessary contracts for the completion and equipment of said railroad, and issue receiver's certificates for the same, subject to the order of the court." Upon that application Jose Parker & Co. appeared and consented to such a modification of the order. The receiver rep-

resented, in substance, that unless the court authorized new certificates, which would be prior in lien to those already issued, he would not be able to secure the completion of the road. Jose Parker & Co., while consenting to the scope of the application of the receiver, objected to the creation of new certificates which would have priority over those already issued. Upon their representation that they could secure a contractor who would complete the road and receive payment in certificates without priority over the issue previously authorized, the disposition of the motion was suspended from July 20th to August 7th to give them an opportunity to do so. At the latter date, Jose Parker & Co., having failed to accomplish what they had attempted, did not appear in court, and the court made the order the correctness of which is now challenged.

We have entertained some doubt whether the order is in such sense a final decision as to permit a review by this court, except on appeal from the final decree in the cause, but have concluded that it is, upon the authority of *In re Farmers' Loan & Trust Co.*, 129 U. S. 206, 9 Sup. Ct. 265, 32 L. Ed. 656.

The question of the propriety of the action of the court in authorizing the receiver to complete the road, and authorizing this to be done by an issue of receiver's certificates in the amount of \$170,000, which should be a prior lien to the mortgage bonds, is not presented by this appeal. To all this the appellants consented, and it is fairly to be assumed that in doing so they recognized this course to be expedient under the circumstances of the case. They not only accepted the certificates issued pursuant to the first order and surrendered the bonds, but they also consented to a modification of that order which might involve the creation of a larger issue of certificates. Their objections raise the single question whether the court was justified in postponing one class of certificate holders to another,—their liens to the new ones created.

We must assume from the facts in the record that, unless the court had made the order which is complained of, the completion of the road in time to secure the town subsidies for the fund under administration would have been impracticable, if it would have been practicable to complete the road at all. There would seem to have been only two alternatives,—to abandon the attempt to complete the road, or to create a larger issue of certificates without priority, and endeavor to complete it with the proceeds. The appellants were apparently unwilling to accept the first alternative. Whether the second was feasible was a question on which they differed with the court. There is no evidence in the record which enables us to ascertain whether the court erred in its judgment upon this question. The application by the receiver for a modification of the original order was not based upon a formal petition or supported by any affidavits or docu-



mentary evidence, and no affidavits were filed in opposition by the creditors who appeared when the application was made. The hearing and decision seem to have proceeded wholly upon the oral statements of counsel to the court. In the absence of such evidence, we are unable to say that the court erred in deciding the question, or that the admissions of counsel upon the hearing were not sufficient to justify the court's conclusion. The propriety of the order, however, presents another question: Was the court warranted in taking any further action towards completing the railroad which would defeat the priority of the existing liens without the consent of the lienholders? It appears that when the bill was filed and when the receiver was appointed only about 6 miles of the proposed 18 miles of railroad had been built, \$130,000 of the unissued mortgage bonds could not be negotiated, and the enterprise had reached a condition of complete financial collapse. The holders of the first mortgage bonds were the only parties having any substantial interest in the property, as it was of no value in excess of their liens to stockholders or unsecured creditors, and apparently not of sufficient value to satisfy their liens. It was a somewhat unusual exercise of the power of a court of chancery under the circumstances to appoint a receiver in a suit to which the trustee of the mortgage bonds was not a party without consulting with the trustee or the bondholders, and we think it was an unwarranted exercise of power to authorize the receiver to undertake the project of completing the road without giving the bondholders an opportunity to be heard. They were the ones of all others who were entitled to a controlling voice in deciding whether there should be an attempt to complete the road, or whether the property should be sold and the proceeds applied towards satisfying their liens. However, it was within the discretion of the court to appoint a receiver without hearing them, and no injustice seems to have resulted to them by the order made at that time authorizing the receiver to complete the road. They were not obliged to accept the certificates in lieu of their bonds, and when they accepted them they acquired a lien as valuable as they had before. But their consent to come in under the terms of that order was not a consent in advance to every further scheme which might be suggested, and when one was proposed which would necessarily impair their liens, and perhaps practically destroy them, they had a right to object, and, having objected, they were entitled to have their liens preserved in the order of their priority, according to the established principles of equity. The appointment of a receiver vested in the court no absolute power over the property, and no general authority to displace vested contract liens. "The holder of a mortgage deed upon a railroad has the same right to demand and expect of the court respect for his vested rights and contracted priority as a holder of a mortgage on a farm or lot." *Kneeland v. Trust*

Co., 136 U. S. 97, 10 Sup. Ct. 950, 34 L. Ed. 379. The appellants were, in effect, equitable mortgagees of the property in the custody of the court, and the priority of their lien was as sacred as though it had been created by the railroad company instead of the court.

The power of a court, which has appointed a receiver in an equity cause and taken possession of a railroad, to subordinate the existing liens upon the property to the expenses of the administration, including those of operating and maintaining it in proper repair, cannot be challenged. But the power to postpone existing liens to liens created by the court for the purpose of completing an unfinished railroad has rarely been exercised, and ought not to be exerted unless it can be done without ultimate loss to the existing lienholders. It is to be exercised with great caution, and, if possible, with the consent or acquiescence of all the parties in interest. *Wallace v. Loomis*, 97 U. S. 146, 24 L. Ed. 895; *Kennedy v. Railroad Co.*, 5 Dill. 519, Fed. Cas. No. 7707; *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963. In *Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136, the court intimated doubt of the propriety of the exercise of the power to the prejudice of the prior lienholders without their consent; but in *Miltenberger v. Railroad Co.*, 106 U. S. 287, 1 Sup. Ct. 140, 27 L. Ed. 117, the court upheld receiver's certificates, with a prior lien to that of a pre-existing mortgage, created for the purpose of obtaining rolling stock, and for building 6 miles of road and a bridge, part of the main line of a road 92 miles long. The latter is the only reported case which has been called to our attention, in which the exercise of the power has been approved, where it was not invoked at the instance of the prior lienholders, or sanctioned subsequently by their acquiescence, or where their conduct did not create an estoppel. In this case, however, the security of the prior lienholders was augmented instead of impaired by the expenditure permitted. The value of the property was to be enhanced far beyond the cost of the new construction, and \$95,000 of the total cost of \$125,000 had been donated for the purpose to the receiver by a municipal corporation and another railroad corporation, and it was upon these considerations that the court below made the order which was under review. That decision affords no support to sustain the present order. Here was a road only one-third built. No one could be found willing to complete it upon the terms which had previously been proposed, and, in view of the whole situation as it was presented to the court, the outcome of an attempt to complete it was too uncertain to authorize it to be made without the consent of the appellants. The effect of the order was certain to render their security more precarious, if not to render it worthless, and the chances that the other creditors of the corporation could realize anything by carrying out the scheme were wholly con-

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jectural. Probably in making the order the learned judge of the court below supposed because the appellants did not appear in court at the time that they did not intend to object to it; but they had already objected to it, and we find nothing in the record to indicate that they intended to waive the objections which they had already made. Under the circumstances, we are of the opinion that the order was an erroneous exercise of judicial discretion.

As the appellants had consented to such a modification of the prior order as would involve the creation of new certificates sufficient in amount to complete the road, the order appealed from should not be vacated, but should be modified by striking out that part making the new certificates prior in lien to those previously issued.

So ordered, and the cause remitted, with instructions to modify the order accordingly.

## SOUTHERN PAC. CO. v. HUNTSMAN.

(Circuit Court of Appeals, Eighth Circuit, November 3, 1902.)

[118 Fed. Rep. 412.]

**Master and Servant—Injury to Employee—Railway Collision—Negligence—Question for Jury.**

Where a fireman on a freight train was injured in a collision with another train, due to the failure of the engineer of the latter train to remain at a station as ordered, the questions whether such engineer was incompetent by reason of his carelessness and forgetfulness, and whether the company knew, or in the exercise of ordinary care might have known, that he was incompetent, *held*, under the evidence, to be for the jury.

**Same—Duty of Railroad in the Employment of Engineers.**

Since the proper performance of the duties of engineers in charge of railway trains depends on their being prudent, alert, and mindful of orders, railway companies must keep a close watch on the habits and mental peculiarities of the persons whom they employ as engineers; this exaction being nothing more than that they exercise ordinary care in the selection of their engineers, in the light of their duties.

**Same—Evidence—Admissibility.**

Where the complaint in an action by a fireman for injuries averred that his only means of escaping serious injury when a collision with another train was imminent was to jump from his engine, which he did, and was injured, and which allegation defendant denied, the admission in evidence of photographs of the wreck, though taken after the positions of the engines had been somewhat changed, was proper, as tending to show the actual result of the collision, and the necessity which existed for the fireman leaping from the engine before the collision occurred.

**Same.**

The admission of testimony that five other persons were injured in the collision was proper, for the same reason.

**In Error to the Circuit Court of the United States for the District of Utah.**

Jeptha D. Howe, for plaintiff in error.

W. L. Maginnis, for defendant in error.



Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. On December 11, 1900, Arthur Huntsman, the defendant in error, was a fireman on an engine belonging to the Southern Pacific Company, the plaintiff in error, which was hauling one of its trains westwardly on its railroad. At a point from 2 to 2½ miles distant from a station in the state of Utah called "Fenelon," it ran into another freight train of the Southern Pacific Company, which was running east at the rate of about 25 miles an hour. The engine of the east-bound train was in charge of an engineer by the name of Sadler, and the collision occurred because Sadler, instead of waiting at Fenelon for the west-bound train to pass, as he had been ordered to do by the train dispatcher, in violation of his orders ran past Fenelon until he came into collision with the west-bound train. The evidence tended to show that the collision occurred on a curve; that the engine of the east-bound train was not discovered until it was about 50 yards distant from the engine of the west-bound train, on which Huntsman was fireman; that, after the discovery of the train approaching from the west, it was impossible to stop the trains in time to avoid the collision; and that, in consequence of that fact, Huntsman leaped from the cab of his engine, and was injured to a considerable extent. He brought the present action to recover damages for the injury which he had sustained in consequence of the collision, and alleged, as a ground of recovery, that Sadler was incompetent to act as engineer of a locomotive engine upon the railroad in question, or upon any railroad, by reason of his being a careless and forgetful person, which fact, as it was alleged, was well known to the defendant company, or, in the exercise of reasonable and ordinary care, ought to have been known. The principal error assigned, and the one that is argued at the greatest length, is that the court erred in refusing to give a peremptory instruction directing the jury to return a verdict in favor of the defendant company. This exception to the action of the lower court, in view of its importance, will be first noticed.

The contention that a peremptory instruction in favor of the defendant company ought to have been given is based upon the ground that there was no substantial evidence tending to show that Sadler was an incompetent engineer, or that the defendant had notice of the fact prior to the collision. To sustain the charge of incompetency, the plaintiff below introduced the following evidence: First, a record kept by the company itself, which showed that Sadler had been in its employ from time to time since August 12, 1892, serving in the capacity of fireman, car inspector, and hostler; that since November, 1898, he had acted as engineer,—a part of the time as engineer on a switch engine, and later, since February, 1899, as engineer on the main line; that on August 24, 1900, he had been suspended for overlooking a train order,

though no collision resulted therefrom; that he had remained suspended until December 5, 1900, when he was reinstated, and that only six days thereafter, to wit, on December 11, 1900, by disobeying or forgetting his orders, and running past Fenelon, he had occasioned the collision which gave rise to the present action. There was other evidence which tended to show, and did show, that in August or July, 1899, a train on the defendant's road, which was running west on regular time, had to back up a mile or two because it met Sadler with his engine on the main line, running an extra, without orders, on the time of the regular train; that the delay so occasioned was reported to the defendant's superintendent; and that on August 24, 1900, when Sadler was suspended, he also ran out on the main line about a mile from a station, where he should have stopped to allow another train to go by, and encountered that train, which had the right of way, but, the track being straight, no collision occurred. There was evidence tending to show that on another occasion he had forgotten his orders commanding him to stop at a certain way station, and that he would have run past it and encountered another train but for the fact that his attention was called to his orders by his fireman, who had some difficulty in convincing him that he had orders to stop. There was also evidence by one witness, who was a fireman who had served under Sadler, tending to show that he was forgetful, and that he had the reputation among other employees of the defendant company of being forgetful, and for that reason incompetent. In view of this testimony, it cannot be said that there was no substantial evidence tending to show that Sadler was unfit to be trusted with the management of a train. It is true, no doubt, that the best of engineers will occasionally make a mistake and suffer a momentary lapse of memory; and for this reason a single error of judgment or a single act of forgetfulness ought not, as a rule, to be esteemed sufficient to warrant the conclusion that an engineer is untrustworthy. But in the present case the evidence had a marked tendency to show something more than a single lapse of memory. It tended to prove that Sadler, either through a defect of memory or other cause, was liable to overlook his orders and take dangerous risks, and that the defendant company, in the exercise of ordinary care, ought to have been aware of the fact. At all events, in view of the testimony to which we have alluded, it was the function of the jury, rather than the trial judge, to determine whether he was the kind of a man to whom the company ought to have intrusted the handling of a train. It cannot be said, we think, that all reasonable persons, in view of the testimony, would have reached the conclusion, necessarily, that there was no substantial evidence tending to establish Sadler's incompetency. Owing to the responsible duties which engineers in charge of railway trains perform, and the fact that many lives and much valuable property depend upon their being prudent,



alert, even mindful of their orders, and not given to fits of abstraction, railroad companies ought to keep a close watch on the habits and mental peculiarities of the persons whom they employ in such responsible positions. This is exacting from them nothing more than the exercise of ordinary care in the selection of that class of employees, when the responsible nature of the duties which they perform, and the consequences that may result from a slight mistake, which in other employments would be trivial, is taken into account. We are of opinion, therefore, that the learned judge of the trial court properly allowed the jury to determine whether the injury of which the plaintiff complained was due to the fact that the company had retained in its service as engineer a person whom it ought to have known was incompetent to discharge the particular duties that had been devolved upon him.

The defendant company also saved a number of exceptions to the admission of testimony, and have argued the same in this court, but a careful examination of these exceptions has served to convince us that they are without merit. Most of them are of so little moment, we think, as not to require special notice. It is strenuously urged by counsel for the defendant company that the trial court should not have admitted two photographs of the wreck, and that it also erred in permitting the plaintiff to testify in his own favor, on his redirect examination, that five other persons besides himself, were injured by the collision. Concerning this testimony, it is said that it was immaterial and irrelevant, and that the photographs of the wreck should not have been admitted in evidence, because they were taken after the positions of the wrecked engines had been somewhat changed. It is also said that this testimony was harmful to the defendant, because it aroused the sympathy of the jury for the plaintiff, excited their indignation, and diverted their minds from the real questions in controversy. We are of opinion, however, that the admission of the testimony, even if was not very material, would not warrant a reversal of the judgment. Nor are we able to concede that the testimony was, as claimed, immaterial. The plaintiff below had averred in his complaint that his only means of escaping serious injury when the collision was imminent was by jumping from the engine, and that he did so jump, thereby sustaining injury. The defendant company denied this allegation, and for this reason it was competent for the plaintiff to show the actual result of the collision, and the necessity which existed for leaping from the engine before the shock of the collision occurred. He could show this fact in no better way than by producing photographs of the wreck, and by testifying that other persons besides himself were injured; and, while there was some testimony that one or both of the engines had been moved slightly before the photographs were taken, yet, as the plaintiff testified that the photographs, as taken, correctly showed the extent to which the engines

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were broken up by the collision, the fact that they had been moved slightly in no way impaired the competency of the evidence for the purpose for which it was admitted. It is clear, we think, that no material error was committed in permitting the photographs to be shown, or in permitting the plaintiff to testify that five other persons besides himself sustained injury. Three of the men so injured were killed, but the trial court was so careful, as it seems, to prevent the admission of any unnecessary testimony which might prejudice the defendant's case, that it declined to permit the fact to be proven that three persons were killed. It simply permitted the plaintiff to testify that five other persons were hurt.

The case was fairly tried throughout, and no sufficient ground is disclosed by the record for reversing the judgment. It is accordingly affirmed.

## MISSOURI PAC. RY. CO. v. DIVINNEY.

(*Supreme Court of Kansas, Division No. 2, July 5, 1902.*)

[69 Pac. Rep. 351.]

## Railroad—Assault by Station Agent—Liability.\*

Where one not a passenger is assaulted by the station agent of a railway company, the company is not liable in damages for injuries received by reason of such assault, unless at the time of its commission the agent was engaged in the performance of some duty imposed upon him by reason of his employment as such agent, or he was acting in the exercise of some authority conferred upon him, either directly or by virtue of his employment.

(Syllabus by the Court.)

Error from district court, Cloud county; Hugh Alexander, Judge.

Action by Will Divinney against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Argued before DOSTER, C. J., and SMITH and POLLOCK, JJ.

Waggener, Horton & Orr and Park B. Pulsifer, for plaintiff in error.

G. M. Culver and F. W. Sturges, for defendant in error.

POLLOCK, J. Action by Divinney to recover from the railway company damages for an assault made upon him by one Taylor, station agent at the station of Ames on defendant's line of railway. There was a trial before the court and a jury. Both parties requested special findings of fact from the jury upon the evidence. These findings, in so far as material in this controversy, are as follows: Requested by plaintiff: "(1) Q. Was the plaintiff a passenger over defend-

\*See *Birmingham Ry. & Electric Co. v. Baird* (Ala.), 22 Am. & Eng. R. Cas., N. S., 909, and monograph, 924 et seq.; *Lexington Ry. Co. v. Cozine* (Ky.), 23 Am. & Eng. R. Cas., N. S., 624.

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ant's road from Ames to Concordia on the morning of August 7, 1900? A. Yes. (2) Q. Did the agent of the defendant, Taylor, at the station at Ames, commit an assault and battery upon plaintiff by striking or beating him in or about the face? A. Yes. (3) Q. Did the plaintiff at any time, on the morning of August 7, 1900, in the station, on the platform, or elsewhere, use, towards defendant's agent, Taylor, or other employee, any language reasonably and naturally sufficient to provoke an assault and battery upon him? A. No." Requested by defendant: "(1) Q. At the time the plaintiff was struck or slapped by Taylor, was he (plaintiff) attempting to purchase a ticket to ride on defendant's train? A. No. (2) Q. At the time said plaintiff was struck or slapped by Taylor, was he, said Taylor, attempting to eject or remove said plaintiff from defendant's depot or depot grounds? A. No. (3) Q. At the time mentioned in the last preceding question, was said Taylor attempting to prevent plaintiff from boarding defendant's train? A. No. (4) Q. At the time said Taylor struck or slapped said plaintiff, did he do so in the discharge of any duty imposed upon him in connection with his acting as agent of the defendant company? A. No." Upon these special findings defendant moved for judgment. This motion was overruled, judgment entered against the company, and defendant brings error.

The action of the trial court in overruling the motion of defendant for a judgment upon the special findings of the jury notwithstanding the general verdict is the sole ground of error submitted for determination by this court. The solution of this question depends upon the extent of the company's duty to afford protection to plaintiff from the wrongful and tortious acts of its servants and agents. It is quite clear, in this case, if the assault made upon plaintiff had been the act of a third party, unassociated with the company, under the circumstances, it would not be liable. Does the fact that the assault was made by the station agent in the employ of the company change the rule as to the liability of defendant? Obviously, this must be determined by the relation plaintiff and the agent bore to the company at the time the injury to plaintiff transpired. If plaintiff had offered himself to the company, and had been received as a passenger by the company before the injury to him occurred, he would have been entitled to demand and receive from the company protection from the unlawful and violent acts of the agents and servants of the company, and third parties as well. If, at the time the injury was inflicted upon him, the agent was engaged in the performance of any duty devolving upon him by reason of his employment by the company, the act of the agent was the act of the company, and the liability of defendant would necessarily follow. The general rule heretofore announced by this court is that the company is not responsible for any act or omission of its servants which is not connected with the



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business in which they serve the company, and which does not happen in the course of their employment. *Hudson v. Railway Co.*, 16 Kan. 470, and authorities cited; *Sachrowitz v. Railroad Co.*, 37 Kan. 212, 15 Pac. 242, 34 Am. & Eng. R. Cas. 382. As the jury, in finding No. 4 requested by defendant, found the agent was not engaged in the discharge of any duty imposed upon him by virtue of his employment at the time of the assault made upon plaintiff, it follows the assault must be regarded as the voluntary act of the agent, and he alone liable to plaintiff for damages arising therefrom, unless plaintiff may be considered to have occupied the relation of a passenger to the company at the time of his injury, and to be entitled to the protection by law accorded to passengers from the carrier. As to this branch of the case, while the jury finds the plaintiff was a passenger upon defendant's train from the station of Ames to Concordia on the morning of his injury, yet this finding must be construed in the light of the undisputed facts found in the record. An examination of the testimony found in the record conclusively shows that the assault occurred before the arrival of the train at the station of Ames, and before plaintiff had either presented himself or been received by the company as a passenger. Hence, upon this branch of the case, it is sufficient to say plaintiff was neither a passenger at the time he received the injury of which he complains, nor does his petition allege him to have been such passenger. His cause of action, as alleged in the petition, is based upon the injury which he received from the assault made by Taylor as agent of the company in the discharge of his duty, and not upon a breach of the duty owed by a common carrier to protect its passengers from injury at the hands of its servants or third parties. It follows, from the finding made by the jury, that the agent at the time of the assault was not acting in the discharge of any duty imposed upon him by his employment. The motion for judgment upon the findings, notwithstanding the general verdict, should have been sustained.

Judgment is reversed, with instructions to sustain the motion and enter judgment in favor of defendant. All the justices concurring.

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KANSAS CITY SUBURBAN BELT R. CO. v. SAME.

(*Supreme Court of Kansas, Oct. 11, 1902.*)

[70 Pac. Rep. 358.]

**Injury to Employee—Liability of Company Transferring Car.\***

A railway company, which delivers a defective freight car to a connecting line, is not liable in damages to an employee of the latter,

\*See *Sheltrawn v. Michigan Cent. R. Co.* (Mich.), 23 Am. & Eng. R. Cas., N. S., 711, and foot-note.

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who is injured by reason of such defects, after the car has been inspected by the company receiving it. The loss of control over the car and over the servants having it in charge relieves the delivering company from responsibility to the employees of the receiving company.

**Same—Same.**

That part of the decision in *Railway Co. v. Merrill*, 61 Kan. 671, 60 Pac. 819, indicated by the first paragraph of the syllabus, is overruled.

(Syllabus by the Court.)

In banc. Error from court of common pleas, Wyandotte county; Wm. G. Holt, Judge.

Action by L. T. Merrill and others against the Missouri, Kansas & Texas Railway Company, and by the same plaintiffs against the Kansas City Suburban Belt Railroad Company. Judgment for plaintiffs, and defendants bring error. Reversed.

Defendant in error L. T. Merrill, who was plaintiff in the court below, recovered a judgment against the Kansas City Suburban Belt Railroad Company and the Missouri, Kansas & Texas Railway Company for personal injuries sustained by him in attempting to pass from a flat or coal car to a box car in the yards of the Chicago Great Western Railway Company in Kansas City, Kan. He was a switchman in the employ of the latter company. The flat car belonged to the Missouri, Kansas & Texas Railway Company. It was loaded with iron pipe at St. Louis, and the contents consigned to St. Joseph, Mo. The line of the latter company terminates at Kansas City, Mo. The car was provided with end gates, which were held in an upright position by wooden cleats, nailed to the inside of the side boards on the outside of the end gates. There were no iron hooks or eyebolts provided, which are generally used to hold the end gates in place. On the arrival of the car in Kansas City, Mo., it was sent from the yards of the Missouri, Kansas & Texas Railway Company to the yards of the Suburban Belt Railroad Company, there inspected by the latter company, placed in a train with about 25 others, and pushed a distance of 2,000 feet across the state line, to a place where cars were usually left to be received by the Chicago Great Western Railway Company. There the car in question was inspected by an inspector of the latter company. The switching crew of the Chicago Great Western Railway Company, of which plaintiff below was a member, then took charge of the string of cars, and hauled them to the yards of the latter company, and proceeded to make up a train destined for St. Joseph, Mo., and places beyond. Plaintiff below was near the engine on a box car, when, in the discharge of his duties, he started toward the rear of the train. Coming to the flat car, he walked over the iron pipe, which was about equal in height to the sides of the car and end gates. The pipe had been pushed back from the end gate so that the top of it was about 15 inches therefrom. Plaintiff stepped with

his right foot from the end of the pipe to the top of the end gate, and attempted to cross over to a box car attached. In doing so, the thrust of his body caused the end gate to give way, and he fell between the cars while in motion. It would seem that the load on the flat car had pushed the sides outwardly so that the cleats nailed thereto did not hold the end gate in an upright position, and permitted it to move past the cleats and topple over when stepped on.

Lathrop, Morris, Fox & Moore and Miller, Buchan & Morris, for plaintiffs in error.

Robert Dunlap, for Atchison, T. & S. F. Ry. Co., as *amicus curiæ*.

Angevine & Cubbison, T. N. Sedgwick, and Silas Porter, for defendants in error.

SMITH, J. (after stating the facts). The question for consideration is whether a railway company which delivers a defective car to a connecting carrier is liable for injuries sustained by an employee of the latter, by reason of such defect, after the receiving company has inspected the car and taken it in charge for transportation over its line. In a former decision of this case it was held to be within the contemplation of the first carrier that the car would be delivered to another for transportation, and it was also known that connecting carriers employ switchmen to handle such cars, and that their services are necessary in the work of making up trains. It was said: "With this knowledge, it was the duty of both plaintiffs in error to provide a car which would be reasonably safe for the service to be performed and for employees of connecting lines to handle, to the end that freight might be expeditiously carried to its destination. \* \* \* Negligence on the part of the Chicago Great Western Railway Company will not excuse the plaintiffs in error either for their failure to inspect, or, having inspected the car, permitting it to be delivered to a connecting line in a condition which might be dangerous to switchmen and other employees engaged in the practical part of the business of railway transportation." *Railway Co. v. Merrill*, 61 Kan. 671-675, 60 Pac. 820, 17 Am. & Eng. R. Cas., N. S., 470. We are now fully convinced that the doctrine announced in the former decision on the subject in hand runs counter to an unbroken current of authorities, and fails to stand the test of reason. A critical examination of the cases cited in the former opinion to sustain the view then taken will show that they are distinguishable from the case at bar. We will review some of them.

In *Railroad Co. v. Snyder*, 55 Ohio St. 342, 45 N. E. 559, 7 Am. & Eng. R. Cas., N. S., 768, 60 Am. St. Rep. 700, there was a traffic arrangement between the different railway companies forming a fast freight line by which they were to share in the earnings of the transportation in proportion to the distance the car should be hauled over their respective roads.



Under the arrangement, the Pennsylvania Company, before delivering its cars to the Lake Shore Company, agreed to have them properly inspected and put in safe condition for hauling. The car, when delivered to the Lake Shore Company to be taken over its road, was defective and unsafe, which proper inspection would have discovered, and injury caused thereby to an employee of the Lake Shore Company. The case differs from the present one. It was argued in the briefs in that case that by reason of the traffic contracts between them the two railroads were partners, and it is stated in the opinion that under the arrangement the Pennsylvania Company, before delivering its cars to the Lake Shore road, was to have them properly inspected, and put in safe condition for hauling. While there is much said in the opinion favorable to the defendant in error on the question before us, yet the peculiar contractual relations of the two roads as to inspection and payment of the cost of repairs do not exist in this case. In the case just commented on, *Moon v. Railroad Co.*, 46 Minn. 106, 48 N. W. 679, 24 Am. St. Rep. 194, is cited and approved. That decision was given prominence as a precedent in the former opinion in this case. In the *Moon Case* the Northern Pacific and Manitoba Railroad Companies were connecting carriers, and interchanged cars at certain common points under a traffic agreement. According to a rule adopted by the companies, cars received and delivered were required to be inspected by the car inspectors of both on the transfer track, and, if any repairs were needed, they were to be made by the Northern Pacific Company before they were transferred and received by the Manitoba Company. Accordingly, the car was so inspected by the car inspectors of both companies. It was examined by them together at the same time, and they agreed that it was in good order. Afterwards, while the car was being operated by the Manitoba Company, the plaintiff's intestate was injured by a defective brake. It was claimed that the brake staff was defective, and also that the car was not properly or carefully inspected by the inspectors of the respective companies. It is to be observed that in the *Moon Case* the inspection by the two companies was substantially one act. The Northern Pacific Company, through its inspector, at the time the inspection was made, knew that no other or further inspection would be made for the protection of the employees of the Manitoba Company. Hence he is held in law to have anticipated that, if his inspection was careless or negligent, the employees of the Manitoba Company would be subjected to whatever dangers should arise therefrom. The court said: "In this case the inspection by the two companies was substantially one transaction, in pursuance of a mutual arrangement under which it was made jointly by the two car inspectors." The case of *Heaven v. Pender*, 11 Q. B. Div. 503, was also cited in the former opinion, and is referred to in *Moon v. Railroad Co.*, *supra*. The

facts on which that decision rested were as follows: The defendant, a dock owner, supplied and put up a staging outside a ship in his dock under a contract with the shipowner. The plaintiff was a workman in the employ of a ship painter, who had contracted with the shipowner to paint the outside of the ship, and, in order to do the painting, the plaintiff went on and used the staging, when one of the ropes by which it was slung, being unfit for use when supplied by the defendant, broke, and by reason thereof the plaintiff fell into the dock, and was injured. In that case the staging was supplied for immediate use, and it was not within the contemplation of the parties that the plaintiff's employer should make an inspection of the appliances to ascertain their fitness prior to their use. It was said by Brett, M. R.: "It must have been known to the defendant's servants, if they had considered the matter at all, that the stage would be put to immediate use; that it would not be used by the shipowner, but that it would be used by such a person as the plaintiff, a working ship painter." In Beven on Negligence (2d Ed. vol. 1, p. 62) the author says: "It is submitted that the principle underlying the decision in Heaven v. Pender is that the dock owner, having undertaken to supply the staging, thereupon undertook the obligation to supply a fit staging, which obligation the plaintiff was justified in assuming he would discharge. Had there been a duty on the shipowner or on the ship painter to examine the staging, the chain of connection between the plaintiff and the dock owner would have been broken. The decision must, therefore, be taken to imply that there was no duty on the part of any one subsequent to the dock owner to test the staging supplied, but that, when the dock owner undertook to supply staging, there was an obligation that the staging supplied should be reasonably fit for the purpose for which it was to be used; so that those coming to use it might trust to the performance of the dock owner's duty without any independent examination of their own."

In Railway Co. v. Booth, 98 Ga. 20, 25 S. E. 928, 5 Am. & Eng. R. Cas., N. S., 512, the deceased was an employee of a mill located on a railway company's switch. The latter placed cars on the switch to be loaded by the mill hands, and by reason of a defect in the car the employee was killed, and his representative recovered judgment therefor against the railway company, which was sustained. The railway company in that case selected and retained control of the car, and placed it in position, knowing the purpose for which and by whom it would be used; thus extending to the injured servant an invitation to use it. Had the master been a mere hirer, or the company exercised no right as to the selection of the cars to be used, the duty of inspection would have been upon the master, and, in case of injury to his servant in consequence of his furnishing an unsafe appliance, the loss would have fallen upon him.



A recovery has been denied in cases like the one at bar on two grounds: First. There being a positive duty resting on the receiving railway company to inspect the car turned over to it for transportation by another company, to the end that its employees may not be injured by defects existing before its receipt, the omission or negligent discharge of such duty breaks the causal connection between the negligence of the company tendering the defective car and the plaintiff's injury. In such cases the failure to inspect, or the negligent manner of doing it, is the proximate cause of the injury to the employee, and the negligence of the company turning over the unsafe car is the remote cause. The failure to discharge the obligation to inspect interposes an independent agency, which serves the causal connection between the company first guilty of negligence and the hurt. It was so held in *Fowles v. Briggs*, 116 Mich. 425, 74 N. W. 1046, 40 L. R. A. 528, 72 Am. St. Rep. 537, a case very similar to this. See, also, in *Lellis v. Railroad Co.*, 124 Mich. 37, 82 N. W. 828, 18 Am. & Eng. R. Cas., N. S., 545. The duty of a railway company to inspect cars of other roads received by it is enjoined by law. *Railway Co. v. Barber*, 44 Kan. 612, 24 Pac. 969; *Railroad Co. v. Penfold*, 57 Kan. 148, 45 Pac. 574; *Railroad Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188. Wharton, in his work on Negligence (section 439), says: "There must be causal connection between the negligence and the hurt; and such causal connection is interrupted by the interposition between the negligence and the hurt of an independent human agency. Thus, a contractor is employed by a city to build a bridge in a workmanlike manner, and after he has finished his work, and it has been accepted by the city, a traveler is hurt when passing over it by a defect caused by the contractor's negligence. Now, the contractor may be liable on his contract to the city for his negligence, but he is not liable to the traveler in an action on the case for damages. The reason sometimes given to sustain such a conclusion is that otherwise there would be no end to suits. But a better ground is that there is no causal connection between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence on the contractor, nor did the contractor accept any confidence from the traveler. The traveler, no doubt, reposed confidence on the city that it would have its bridges and highways in good order; but between the contractor and the traveler intervened the city, an independent responsible agent, breaking the causal connection." The principle above stated is well illustrated in *Carter v. Towne*, 103 Mass. 507. There the defendant negligently sold gunpowder to a child, but the child gave all of the powder to its parents, who afterwards allowed the child to take some of it, by the explosion of which he was injured. The defendant was held not liable, because the effect of his negligence had been cured by the intervening breach of the child's parents in

taking charge of the powder, and their consequent negligence in allowing the child to have it again could not restore the connection between the defendant's original negligence and the final injury.

A second, and, we think, better founded, reason for denying the right to recover in cases like the present is that the liability to a servant ceases with the control of the master over his actions. In *Glynn v. Railroad Co.*, 175 Mass. 510, 56 N. E. 698, 17 Am. & Eng. R. Cas., N. S., 482, 78 Am. St. Rep. 507, the plaintiff was in the employ of the New York, New Haven & Hartford Railroad Company, in Connecticut, and was injured while coupling a car belonging to a New Jersey railway company, which had a defective coupling apparatus. He sued the latter company. The court, in holding the defendant not liable, said: "There was no dispute that, after the car had come into the hands of the New York, New Haven & Hartford Railroad, and before it had reached the place of accident, it had passed a point at which the cars were inspected. After that point, if not before, we are of opinion that the defendant's responsibility for the defect in the car was at an end. \* \* \* But when a person is to be charged because of the construction or ownership of an object which causes damage by some defect, commonly the liability is held to end when the control of the object is changed. Thus, the case of *Clifford v. Cotton Mills*, 146 Mass. 47, 15 N. E. 84, 4 Am. St. Rep. 279, shows that the mere ownership of a house so constructed that its roof would throw snow into the street, and therefore threatening danger as it is, without more, whenever snow shall fall, is not enough to impose liability when the control of it has been given to a lessee who, if he does his duty, will keep it safe. In the case at bar the car does not threaten harm to any one unless it was used in a particular way. Whether it should be used in a dangerous way or not depended, not upon the defendant, but upon another road. Even assuming that the car had come straight from the defendant at Harlem River, the defendant did no unlawful act in handing it over. Whatever may be said as to the responsibility for a car dispatched over a connecting road before there has been a reasonable chance to inspect it, after the connecting road has had the chance to inspect the car and has full control over it the owner's responsibility for a defect which is not secret ceases. See *Sawyer v. Railway Co.*, 38 Minn. 103, 35 N. W. 671, 8 Am. St. Rep. 648; *Wright v. Canal Co.*, 40 Hun, 343; *Mackin v. Railroad Co.*, 135 Mass. 201, 206, 46 Am. Rep. 456." In this case there was no contractual relation existing between the switchmen in the employ of the Chicago Great Western Railway Company and the plaintiffs in error. They did not employ them, and they had no power to discharge them. They could protect themselves against damages resulting to their own servants by reason of defects in the car by giving them notice of its condition, in

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which event their servants would have the option of assuming the risk or of quitting the service of their employers. There was no relation of confidence between Merrill and the plaintiffs in error. The latter owed a duty to their own servants to see that the cars put in their charge were in a reasonably safe condition and in proper repair, but to extend this duty to every servant of every other railroad in the United States under whose charge defective cars might come would be to formulate a new rule of liability for negligence not sustained by reason or authority. In *Sawyer v. Railway Co.*, 38 Minn. 103-105, 35 N. W. 672, 33 Am. & Eng. R. Cas. 394, 8 Am. St. Rep. 648,—a case in many respects like the present one,—the court said: "At the time of the accident the car was under the management and control of the company operating it, and not of the defendant. It did not come to the hands of the plaintiff through the agency or by the authority of the defendant, and there is no privity between them. It owed him no duty growing out of contract, and was not bound to furnish him safe instrumentalities. As to the defendant, the plaintiff was a mere stranger. [Citing authorities.] \* \* \* The liability of the defendant in respect to the condition of its cars did not extend beyond those to whom it owed some duty by reason of its relation to them as master, employer, or carrier. Any other rule would be found impracticable of application in ordinary business operations." A railway company might have occasion to send a train of defective cars from San Francisco to Boston for repairs, to be hauled over several lines of road. Its own servants, knowing their bad condition, would use a high degree of care to avoid injury from them; but, under the theory of counsel for defendant in error, unless the company forwarding them gave express notice of their condition to every railway employee of the several roads transporting the cars, it would be liable for damages to them in the event they were hurt by reason of such defects. In *Winterbottom v. Wright*, 10 Mees. & W. 109-114, the defendant had contracted with the postmaster general to provide a coach for carrying the mail, and agreed to keep it in repair, and fit for use. Other persons had a contract with the postmaster general to supply horses and coachmen for conveying the coach. The vehicle broke down, and injured the driver, by reason of the negligence of the defendant in failing to keep it in proper repair and fit for use. Lord Abinger said: "There is no privity of contract between these parties; and, if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." So a gas fitter was held not liable for damages for negligently hanging a chandelier in a public house, knowing

that it would likely fall on plaintiff and others unless properly hung. It fell, and injured the plaintiff. The court held that he had no cause of action, because the declaration did not disclose any duty by the defendant towards the plaintiff for the breach of which an action could be maintained. *Collins v. Selden*, L. R. 3 C. P. 495. In *Heizer v. Manufacturing Co.*, 110 Mo. 605-617, 19 S. W. 633, 15 L. R. A. 821, 33 Am. St. Rep. 482, a servant of the purchaser of a steam boiler was injured by the explosion of it. He sought to charge the manufacturer of the boiler, and alleged that the latter, when he sold it, warranted it to be free from defects, and of first-class material; that the cylinder was made of poor material, was defective in construction, and too weak to stand the ordinary strain,—all of which defects were known to the defendant's agents at the time of the sale,—and by reason thereof the explosion occurred. The court, in denying a right to recover, said: "Wharton thinks the better reason for the rule is that there is no causal connection between the negligence and the hurt; but, be this as it may, the rule itself is well established in England and in the United States, and we think the case in hand comes within it. It is true the defendant must have known, when it made and sold the machine to Ellis, that other persons would be engaged in operating it; but this is no reason why defendant should be held liable to such other persons for injuries arising from the negligent use of poor material or for defective workmanship. Such knowledge must have existed in the cases which have been cited as asserting the rule, and would have been as good an argument against the rule in those cases as in the case at hand."

\* \* \* The plaintiff's case tends to show no more than negligence, and an action based on that ground must be confined to the immediate parties to the contract by which the machine was sold. To hold otherwise is to throw upon the manufacturers of machinery not necessarily dangerous a liability which, in our opinion, the law will not justify." In the case quoted from, a large number of authorities, both English and American, are collected, which sustain the principle announced. See, to the same effect, *Necker v. Harvey*, 49 Mich. 517, 14 N. W. 503; *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Bragdon v. Perkins-Campbell Co.*, 30 C. C. A. 567, 87 Fed. 109.

One of the principal reasons given in the former decision in this case for holding plaintiffs in error liable was that they knew that this defective car, after it left their hands, must be switched about, and put into trains of connecting roads by switchmen employed by the latter, and, with such knowledge, they were negligent in permitting it to go into the charge of such railway employees in a defective condition. In the many cases cited and quoted from above it was equally well known by the manufacturer of a defective machine—like an elevator, for example—that employees of the purchaser would



be called on to use it; yet, there being no privity between the maker of the machine and the vendee's servants who were injured by it, there could be no recovery by the latter against the manufacturer or builder. *Heizer v. Manufacturing Co.*, supra. If responsibility for defects in this car is to be fixed on the two railways, or either of them, then the application of such a rule of liability must, of necessity, be extended to cover the case of a brakeman injured by a negligently constructed car wheel, and permit a recovery by him of damages against a foundry company which cast and furnished the wheel and sold it to the railway company; for it is within the contemplation of a manufacturer of car wheels that they will come into the charge and control of the servants of the railway companies using the cars. If such wheels are negligently constructed, the contemplated purpose of their future use being manifest, the liability of the maker would follow that use everywhere whenever they happened to cause injury to a railroad employee operating them. This liability of the maker could not be defeated by the fact that the defective appliances might have changed ownership and control many times after their first adaption to railway purposes. As we have seen, the liability of negligent parties so far removed from the injury as the manufacturer in the supposed case finds no support in the authorities. The defective car was not inherently dangerous. It was the manner of its use which caused the injury. The two railway companies that handled the car before its delivery to the Chicago Great Western Railway Company cannot be held to that strict account which the law imposes on one who negligently delivers poisonous drugs to another, imminently dangerous to human life, which fall into the hands of third persons to their injury. In *Roddy v. Railway Co.*, 104 Mo. 234-247, 15 S. W. 1114, 12 L. R. A. 746, 24 Am. St. Rep. 333, it is said: "It cannot reasonably be contended that a railroad car, though supplied with defective brakes, is an imminently dangerous instrument. Unless put in motion, it is perfectly harmless, and when in motion is not essentially dangerous." In *Mastin v. Levagood*, 47 Kan. 36-42, 27 Pac. 124, 27 Am. St. Rep. 277, it is said: "There is a marked distinction between an act of negligence imminently dangerous and one that is not so; the guilty party being liable in the former case to the party injured, whether there was any relation of contract between them or not, but not so in the latter case." *Glynn v. Railroad Co.*, supra.

Counsel for defendant in error have invoked the rule stare decisis, and insist that the former decision must govern on the second appeal. This would come to us with more force if we were not now considering the same case with the same parties before the court. If an erroneous decision has been made, it ought to be corrected speedily, especially when it can be done before the litigation in which the error has been com-



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mitted has terminated finally. We are fully satisfied that the rule of the former case is shattered by the pressing weight of opposing authority, and that reason is against it. In *Ellison v. Railroad Co.*, 87 Ga. 691, 13 S. E. 809, the learned Chief Justice Bleckley uses the following forcible language: "Some courts live by correcting the errors of others and adhering to their own. \* \* \* Minor errors, even if quite obvious, or important errors if their existence be fairly doubtful, may be adhered to and repeated indefinitely; but the only treatment for a great and glaring error affecting the current administration of justice in all courts of original jurisdiction is to correct it. When an error of this magnitude, and which moves in so wide an orbit, competes with truth in the struggle for existence, the maxim for a supreme court, supreme in the majesty of the duty as well as in the majesty of power, is not 'stare decisis,' but 'Fiat justitia ruat cælum.'"

The judgment of the court below will be reversed, with directions to enter judgment on the finding of the jury in favor of the defendants below. All the justices concurring.

DOSTER, C. J. (concurring specially). I believe we were in error in the former determination of this case, and therefore concur in the decision now made. However, I do not believe that our present judgment can be rested on the theory of the breaking of causal connection between the negligent acts of the railway company delivering the defective car and the one receiving it, caused by the latter's failure to inspect, or the making by it of an ineffective inspection. A failure to inspect, or a careless inspection, either one, was a simple failure to do a duty,—an omission, not an affirmative act of wrongdoing; and I think the breaking of causal connection between a series of negligent acts is accomplished only by the doing of something by somebody else which operates as a new and independent producing cause, diverting the first negligent act from its natural end, and giving it a direction and force it would not otherwise have. It is not philosophical to speak of causal connection between act and consequence being broken by a mere failure, though a negligent one, of some person, not the original actor, to do something. Causal connection is broken only by the intervention of active agencies, not the occurrence of passive conditions and qualities.

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MORRISETTE *v.* CANADIAN PAC. RY. CO.

(*Supreme Court of Vermont, Orleans, May 22, 1902.*)

[52 Atl. Rep. 520.]

**Injury to Brakeman—Negligence—Switch near Track.\***

A railroad company is not, as matter of law, free from negligence,

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\*As to the master's duty to furnish safe place to work, see foot-note appended to *Choctaw, O. & G. R. Co. v. McDade* (C. C. A.), 1 R. R. R. 413, 24 Am. & Eng. R. Cas., N. S., 413.

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where, from convenience, and not from necessity, it places a switch so near the track that a brakeman going up the side of a moving car, and not notified of its proximity, is struck by it.

**Same—Same—Same—Assumption of Risk.†**

A brakeman does not assume the risk of a switch so near the track that he is struck by it while going up the side of a moving car, he not knowing or having occasion to see that it is so near, and it not being obvious, and he having found other switches at a safe distance.

**Same—Switch near Track—Contributory Negligence.**

Contributory negligence of a brakeman, struck, while going up the side of a moving car, by a switch too near the track, does not necessarily prevent the negligence of the railroad company from being the proximate cause of the accident.

**Exceptions from Orleans county court; Tyler, Judge.**

Action for personal injuries by Arthur Morrisette against the Canadian Pacific Railway Company. Judgment for defendant on a verdict ordered on motion, and plaintiff brings exceptions. Reversed.

Argued before ROWELL, MUNSON, START, WATSON, and STAFFORD, JJ.

E. A. Cook and J. W. Redmond, for plaintiff.

F. E. Alfred and W. W. Miles, for defendant.

ROWELL, J. This is case by a servant against the master for negligence in being knocked from the side of a moving freight car by a switch standing near the track. The declaration contains two counts. The first is in common form. The second is like the first, except it alleges that in the province of Quebec, where the accident happened, the law was, at the time in question, that "every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill," and that by said law, as interpreted by the courts of said province, contributory negligence does not

†As to the master's liability for injuries to employees from structures near track, see *Wood v. Louisville & N. R. Co.* (C. C.), 11 Am. & Eng. R. Cas., N. S., 525, and note, 531 et seq.; *Bence v. New York, N. H. & H. R. R.* (Mass.), 3 R. R. R. 295, 26 Am. & Eng. R. Cas., N. S., 295; *Gulf, C. & S. F. R. Co. v. Darby* (Tex. Civ. App.), 2 R. R. R. 327, 25 Am. & Eng. R. Cas., N. S., 327; *Choctaw, O. & G. R. Co. v. McDade* (C. C. A.), 1 R. R. R. 413, 24 Am. & Eng. R. Cas., N. S., 413; *Donahue v. Boston & M. R. R.* (Mass.), 20 Am. & Eng. R. Cas., N. S., 526; *Phelps v. Chicago & W. M. Ry. Co.* (Mich.), 20 Am. & Eng. R. Cas., N. S., 137; *Chicago & A. R. Co. v. Stevens* (Ill.), 20 Am. & Eng. R. Cas., N. S., 182; *Phelps v. Chicago & W. M. Ry. Co.* (Mich.), 16 Am. & Eng. R. Cas. 302; *Pahlan v. Detroit, G. H. & M. Ry. Co.* (Mich.), 16 Am. & Eng. R. Cas., N. S., 309; *Keist v. Chicago, G. W. Ry. Co.* (Iowa), 16 Am. & Eng. R. Cas., N. S., 297; *Potter v. Detroit, G. H. & M. Ry. Co.* (Mich.), 16 Am. & Eng. R. Cas., N. S., 264; *Myers v. Chicago, St. P., M. & O. Ry. Co.* (C. C. A.), 14 Am. & Eng. R. Cas., N. S., 749; *Haffner's Adm'r v. Chesapeake & O. Ry. Co.* (Va.), 12 Am. & Eng. R. Cas., N. S., 555; *Louisville & N. R. Co. v. Cooley's Adm'r* (Ky.), 12 Am. & Eng. R. Cas., N. S., 553; *Hughes v. Louisville & N. R. Co.* (Ky.), 12 Am. & Eng. R. Cas., N. S., 560; *Hardy v. Boston & M. R. R.* (N. H.), 12 Am. & Eng. R. Cas., N. S., 565.

defeat recovery; that by said law the defendant was bound to furnish the plaintiff with the safest place in which to work, and that "the word 'person' includes bodies politic and corporate." The defendant pleaded the general issue, and, when plaintiff rested, moved for a verdict: (1) For that on the pleadings and the evidence no recovery could be had; (2) that there was no question of fact for the jury; (3) no negligence shown on the part of the defendant; (4) plaintiff guilty of contributory negligence as matter of law; (5) that he assumed the risk; and (6) that he was not in the line of duty when injured. The court sustained the motion, directed a verdict for the defendant, and rendered judgment thereon, to which the plaintiff excepted.

The plaintiff was head brakeman on a freight train running from Megantic, through Lennoxville, to Sherbrook. The switch in question stood in the yard at Lennoxville, between the main line and siding No. 1, as it is called in the case, and was 22 or 23 inches from the side of an ordinary freight car passing it on the siding. The plaintiff's train, having orders to meet another train at Lennoxville, took said siding in order to clear the main line for that purpose, and the plaintiff, having dismounted from his train to inquire of the operator about the other train, was endeavoring to remount, the train being in motion, and while his hands were hold of the grab irons and his feet in the stirrup, trying to reach a ladder on the end of the car, he was knocked off by the switch and injured. The testimony tended to show that the switch could have been located south of the main line, but that it would not be so convenient there, and could not be seen near so far by a train coming from Megantic. It also tended to show that the plaintiff had never been told that the switch was near enough to the track to knock open from the side of a passing car, and that he did not know it was. Can it be said, as matter of law, that the defendant was not guilty of negligence in placing and maintaining this switch so near the track? The cases bearing on this question are numerous, and need not be reviewed, as that work has been so often done, and the rule established by them so frequently deduced and applied. Thus, in *Davis v. Railroad Co.*, 55 Vt. 84, 90, 45 Am. Rep. 590, it is said: "Where the employment is hazardous, it is very generally agreed that the master assumes the duty of exercising reasonable care and prudence to provide the servant a reasonably safe place and reasonably safe machinery and tools to exercise the employment, and to maintain them in a reasonably safe condition." This is the doctrine of the cases generally, though variously stated. Thus, in *Railway Co. v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766, it is said: "The general rule undoubtedly is that a railroad company is bound to provide suitable and safe materials and structures in the construction of its road and appurtenances, and if, from a defective construction thereof, an injury happens

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to one of its servants, the company is liable for the injury sustained. The servant undertakes the risks of the employment as far as they spring from defects incident to the service, but he does not undertake the risks of the negligence of the master. The master is not to be held as guarantying or warranting absolute safety in all circumstances, but it is bound to exercise the care that the exigency reasonably demands in furnishing proper roadbed, tracks, and other structures.

\* \* \* It is the duty of the company, in employing persons to run over its road, to exercise reasonable care and diligence to make and maintain it fit and safe for use; and, when a defect is the result of faulty construction that the employer knew or must be charged with knowing, it is liable to the employee for injuries resulting therefrom, if he used due care on his part." In *Johnson v. Railway Co.* (Minn.) 44 N. W. 884, it is said that a railroad company is bound to place signal posts or other structures used in connection with its road, or the operation thereof, at a reasonably safe distance from the track, so as not to endanger brakemen or other employees who work on its trains; and if, for any reason, it is necessary to erect or place such structures so close as to be hazardous to its employees, it is its duty to warn them of the danger, that they may understand the nature of the risks to which they are exposed; and that, in the absence of such notice, they have a right to assume that the company has performed its duty in that respect. Applying this doctrine to the case, it is clear that the question stated must be answered in the negative. But it is claimed that the plaintiff assumed the risk. He did assume it if he knew and comprehended it, or if he ought to have known and comprehended it; but not otherwise, for it was not a risk ordinarily incident to such a service. The plaintiff had worked for the defendant several years; part of the time as yard brakeman at Megantic; part as spare freight brakeman over this and other portions of the line; and for four or five months before the accident as regular freight brakeman over this part of the line, and as such brakeman had many times passed through Lennoxville, knew the sidings there, and the location of this switch, which he had operated several times. He had never passed it on the siding in question on the side of a car, and had never been told, and did not know, that it was near enough to the track to knock one from the side of a car; had never stayed by the switch when a car passed it, and never had occasion to, and had always found the other switches on the road safe. The switch was not of itself a dangerous thing. Its danger lurked in its nearness to the track. But it is impossible to say as matter of law that that danger could have been seen and comprehended by mere observation, unaided by measurements, seeing a car pass, or some such thing. If it could have been, it is fair to presume that some one whose duty it was would have discovered and remedied it, for the switch had stood there several years.



There are many cases supporting this view. The defendant cites *Lovejoy v. Railroad Corp.*, 125 Mass. 79, 28 Am. Rep. 206, as a leading case holding a different doctrine. But that case is unlike this. There the plaintiff knew that the electric signal posts against one of which he struck when leaning out of his engine, were set at the uniform distance of three feet and eight inches from the track all along the line; and the court said, knowing this, he assumed the risk. But here the switches were not at a uniform distance from the track, and, besides, the plaintiff had always found other switches along the line at a safe distance. The defendant cites many other cases to the same point, and largely from Massachusetts. But they go mainly upon the ground that the danger was obvious, and nothing of the nature of a trap in it. But here there was a trap, in that the danger was not obvious, and knowledge of it not chargeable to the plaintiff as matter of law. The law of the province of Quebec on this subject seems to be stronger against the master than our law. The testimony tended to show that by that law the master is bound to use all reasonable care, and the best possible means to protect his servant, both as to the place in which he is employed and the appliances that he is given to work with, and that the servant's knowledge of the danger does not exonerate the master. The testimony also tended to show that by the law of said province, the master owes to the servant all the protection that a good father of a family owes to his children, and is bound to take precautions necessary to guard the servant against accidents while in the line of his duty, even though caused by his mistakes, imprudence, or thoughtlessness; that contributory negligence is not a bar, unless it is the proximate and primary cause of the accident, but goes only in mitigation of damages; and that, if the parties are in equal fault, the defendant is liable, but the plaintiff's fault mitigates, and perhaps to the extent of dividing the damages. It appears by the transcript sent up, but not by the exceptions, that the trial court ruled the case on the ground of contributory negligence, and held that that was the proximate and primary cause of the accident, and defeated recovery under the provincial law as well as under our law. But we do not think that it can be said as matter of law that the plaintiff was guilty of contributory negligence. The danger was not sufficiently obvious. He did not know enough about it, and was not enough in fault for not knowing,—to say that. And, if he was guilty of contributory negligence, it does not follow as matter of law that it would defeat recovery under the provincial law, for, if the parties were in equal fault, their faults were equally the proximate and primary cause of the accident, as they were concurrent, the defendant's being continuous; and if they were not in equal fault, it cannot be said as matter of law that defendant's negligence was not the proximate and primary cause, instead of the plaintiff's. In some cases



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—as in cases of marine insurance—the nearest cause in time and place is considered as the proximate cause, for such is conclusively taken to be the intention of the parties to the contract. Here the proximate cause is the *causa causans*, the efficient and operative cause, which is by pre-eminence the cause. So, in bills of lading, the *causa causans* determines the liability of the shipowner on his contract of affreightment. But in actions of tort for negligence this is not so. There the *causa* may be modified to the degree of *sine qua non*, and its proximity has no necessary connection with continuity of space or nearness of time, but only with that of which the result is the natural and probable consequence in the sense that a prudent man ought to have foreseen it. Hence, in this class of cases, the defendant's negligence is the proximate cause of the natural and probable consequences of it; and, whether the result complained of in the concrete case is the natural and probable consequence of it is a question for the jury, unless it is plain enough to be ruled as matter of law, which it is not in this case. The testimony to prove the provincial law alleged in the declaration consisted of certain provisions of the Civil Code of the province, and of the testimony of provincial lawyers, who produce in support of their testimony and referred to text-books that they declared to be authoritative, and official reports of judicial decisions construing said provisions, and referred to cases in reports not produced, and to some so recent as not to be reported. The court ruled that this testimony was addressed to the court, and not to the jury, which the plaintiff says was error. The defendant objects that the question is not raised by the exceptions, which are only to the direction of a verdict and the rendition of judgment thereon. But, as every question involved in the rendition of a judgment is reached by an exception to its rendition, the question is raised.

Confining ourselves to the precise question presented, we hold that when a foreign law is to be proved as an ultimate fact, and the issue is raised by the pleadings and joined to the country, the testimony consisting of statutory provisions and expert testimony as to the construction of those provisions, supplemented and supported by text-books and judicial decisions, the question is for the jury under proper instructions. This proposition is supported by our cases. Thus, in *Woodbridge v. Austin*, 2 Tyler, 364, 4 Am. Dec. 740, it being necessary for the plaintiff to prove the law of the province of Lower Canada, on which certain judicial proceedings were based, he said he could not do it, as they were based on the common law of the country, which was unwritten, and therefore could not be produced. But the court said, if a foreign law is written, it must be produced, but, if unwritten, it must be proved like any other fact, by the testimony of witnesses: and quoted what Lord Mansfield said in *Cowper* that "the way of knowing foreign laws is by admitting them to be

proved as facts, and the court must assist the jury in ascertaining what the law is." So, in *State v. Stade*, 1 D. Chip. 303, it was permitted to read a statute of New York to the jury, to show the incorporation of a bank there. In *Danforth v. Reynolds*, 1 Vt. 259, the question of what the Massachusetts law was, being preliminary to the admission of a deposition, the proof was addressed to the court. In *Territt v. Woodruff*, 19 Vt. 182, it seems to have been held that it was for the auditor to find as a fact what the law of another state was. So in *Taylor v. Boardman*, 25 Vt. 581, it would appear that testimony was addressed to the jury, to show that a chattel mortgage had been foreclosed according to the law of Massachusetts. In *Peck v. Hibbard*, 26 Vt. 706, 62 Am. Dec. 605, it is said that foreign laws must be pleaded and proved as facts. And in *McLeod v. Railroad Co.*, 58 Vt. 737, 6 Atl. 652, it is said that: "When a foreign law creates a duty, it becomes a traversable fact like any other fact creating a duty, upon which the defendant has a right to go to the jury, and it must be alleged in the declaration." And this is said to be the general rule. 1 Whart. Ev. § 303. In *Ufford v. Spaulding*, 156 Mass. 65, 30 N. E. 360, three kinds of evidence were introduced to prove the law of New Hampshire, namely, statutory, judicial decisions, and an auditor's report; and it was held to be a question of fact for the jury. In *Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179, the court instructed the jury what the law of New York was. Held error, for that the question should have been submitted to the jury. In *Hall v. Costello*, 48 N. H. 176, 2 Am. Rep. 207, it is ruled the other way; but some of the cases referred to in support of the ruling are quite to the contrary, and some are in chancery. Thus, in *Church v. Hubbard*, 2 Cranch, 187, 2 L. Ed. 249, the circuit court permitted foreign edicts and judgments of sequestration to go to the jury. The supreme court did not intimate that this was wrong, but held that they were not admissible, because not properly authenticated. In *Francis v. Insurance Co.*, 6 Cow. 404, 429, it is expressly said that such evidence is addressed to the jury. *Monroe v. Douglass*, 5 N. Y. 447, is a chancery case, and so is the one referred to by Peere Williams. *Trimbey v. Vignier*, 6 Car. & P. 25, is much in point. There the question was as to the meaning of certain sections of the Code Napoleon in respect of bills of exchange. A French advocate was called as a witness by the defendant, and testified his opinion of the meaning and legal effect of the sections, referring to a printed copy of the Code before him, and reading decisions of the French courts in support of his opinion; and the question was submitted to the jury, with full instructions to assist them in ascertaining what the law was. The defendant contends that there was no conflict in the testimony as to the provincial law, and that, therefore, it was for the court to say what it was. But it is not for the court, in a case like this, to determine an issue of

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fact joined to the country merely because the testimony is not conflicting. The question is still for the jury if the testimony tends to support the issue. Nor can it be said that the testimony was not conflicting, to some extent at least, for decisions were referred to holding the law both ways; the testimony tending to show that the decisions had gradually changed since about 1866, until the law had come to be what the plaintiff claimed it. It was for the jury to say how this was.

Whether the plaintiff was in the line of his duty or not when injured was a question for the jury, as his testimony tended to show he was; for he said that it was his duty to make the inquiry of the operator that he did; that he had left his train "lots of times" to make such inquiry, and had done it several times at this station; and that the object of his inquiry at this time was to ascertain whether he had got to cut his train to clear a highway crossing there, which could not be blocked longer than five minutes. It does not appear whether the rule prescribing this duty of inquiring was in writing or not. Several printed rules were shown in evidence, some of which, the plaintiff said, did not apply to his train at that time, and none of which can be said to override his testimony as to his duty to inquire. Therefore it was for the jury to say whether he was justified in leaving his train.

Judgment reversed, and cause remanded.

KENNEY v. MEDDAUGH *et al.*

(Circuit Court of Appeals, Sixth Circuit, August 15, 1902.)

[118 Fed. Rep. 209.]

## Locomotive Fireman—Injury from Mail Crane—Assumption of Risk.\*

A locomotive fireman will be held to have assumed the risk from proximity to the track of a mail crane; he having been a fireman on the road for a year, during which there was no increase in the size of the engines, and having passed this place 83 times, and been over the other division 123 times, and the crane having been in position all that time, and at substantially the same distance from the track as the other cranes on both divisions; and this though it was dark, and blowing hard and snowing, these circumstances merely requiring extra caution on his part.

## Same—Providing Safe Place to Work.

A railroad company cannot be held to have failed to use due care to provide a locomotive fireman a reasonably safe place to work, by reason of a mail crane, when in position, being, at its nearest point, only 13½ inches from the side of the locomotive; this being the distance of the other cranes on this and other roads; the master car builder, who was familiar with the government regulations, and under whose supervision the catches on the mail cars were constructed, testifying that they could not be operated efficiently if placed at a greater distance; and there being no testimony of a competent witness to the contrary.

## Same.

A railroad company owes no duty to a locomotive fireman, familiar with the road, to place lights on mail cranes.

\*See generally, foot-note appended to *Gulf, C. & S. F. Ry. Co. v. Darby* (Tex.), 2 R. R. R. 327, 25 Am. & Eng. R. Cas., N. S., 327.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

This is an action to recover damages for the alleged wrongful death of Cornelius J. O'Brien. The lower court at the close of all the evidence, upon motion of defendants, directed a verdict for them. The judgment rendered thereon is complained of herein. The accident which resulted in O'Brien's death happened after dark on the evening of February 1, 1900, at Climax, a station on the Western division of defendants' railroad, extending from Battle Creek, Mich., to Chicago, Ill. It is the second station west of Battle Creek, and a short distance therefrom. At that time, decedent was fireman on defendants' fast passenger train from Battle Creek to Chicago, due to leave the former place at 3:40 p. m., but which in fact left at 5:57 p. m., being 2 hours and 17 minutes late, and reached Climax at 6:15 p. m. The depot at that station is on the south side of the track, or left-hand side as you go west. On the same side, and about 475 feet east of the depot, a mail crane was stationed, to hold mail pouches to be taken aboard of fast passenger trains not stopping there, by means of mail catchers attached to the mail cars. As decedent's train passed this mail crane that evening, he was struck in the forehead by the upper arm thereof, and rendered unconscious, and shortly thereafter he died. No one saw the collision, and it is only a matter of inference from circumstances that his death was due to this cause. But there can be no doubt as to this, and defendants in error do not contend that it was not. In addition to its being dark, there was testimony to the effect that it was snowing, though not to any great extent, and blowing hard. In front of the depot building, and about 11 or 12 feet from the track, was a signal board which indicated to each train as it passed the number of the train just ahead of it, and the time it passed the station, and above it a signal light,—red if there was danger, and white if the way was clear. East of the mail crane, about the same distance that it was east of the depot, there were signal lights at two switches, probably on the north side of the track, or right-hand side as you go west. There was a rule of the company which required firemen on locomotives to be on the lookout for and to receive all the signals which might be given or located on the left side of the locomotive, and to transmit them promptly and correctly to the engineer. It was claimed by defendants that it was not necessary for a fireman to look out of the window on the side of the cab in order to comply with this rule; that he could see the entire width of the right of way, and beyond it, by looking out of the window in front; by plaintiff, that this could not be done when the vision through the window was obstructed by accumulated snow; by defendants, that in such event the fireman could open and clean the window, and thus remove the obstruction to his sight; and by plaintiff, that this could not be done when the



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snow was continuous. There was, however, no evidence that vision from the window in front was obstructed by snow at the time of the accident. It was purely a matter of speculation as to whether it was. But there was evidence that it was more or less customary for firemen on defendants' railroad to look out of the side window, in watching for signals. It was proven, though, that in order for him to do so it was not necessary that he should put his head out more than four to six inches.

Decedent had been in the employ of defendants as a fireman for not quite a year before the accident. In that time he had worked upon both divisions of defendants' road,—the most of the time, however, on the Eastern division, from Battle Creek to Port Huron. He had made, in all, 206 runs. Of these, 123 were on the Eastern division, and 83 on the western. He had worked on both freight and passenger trains. He had made 9 runs on passenger trains on the Eastern division, and 6 on the Western. During that time there were in use on defendants' railroad 16 large Baldwin engines,—8 on freight trains and 8 on passenger,—and others of a smaller type. There was no difference between those used on freight trains and those on passenger, save in this: that the cabs of the latter were 6 inches higher than the former. Of the nine runs which decedent had made on passenger trains on the Eastern division, eight were on the larger engines, and one on the smaller. Of the six runs which he had made on the Western division, four were on the larger engines, and two on the smaller. Of the runs on freight trains, about twice as many were made on the larger engines as the smaller, and in the six months preceding the accident they were almost entirely on the larger engines. The firemen, as well on passenger as on freight engines, had nothing to do in connection with the mail cranes along the road, and the opportunity of observing them and their proximity to the railroad track was as good on freight engines as on passenger. They were often up in position when freight trains passed or were on sidings waiting for passenger trains to pass. The distance between the outer end of the upper arm of the mail crane in question when in position and the outer edge of the nearest rail was 3 feet 6½ inches, according to the testimony of defendants' employee who had charge of its mail cranes, and who measured the distance about the time of the accident. According to the testimony of a carpenter who had no connection with the railroad, introduced as a witness by plaintiff, the distance, at some time within the year after the accident, not more definitely located, was 3 feet 5½ inches. There were a number of mail cranes along the line of defendants' railroad. On the Eastern division there were about 19; on the Western division, between Battle Creek and Elsdon, a distance of 168 miles, there were 7 or 8. According to the standard prescribed by defendants for the use of those who



construct them, the distance of mail cranes, measuring as above, should be 3 feet 6 inches. As to the bulk of those on defendants' road, the distance was 3 feet 6 inches, and above. As to one, it was as high as 3 feet 7 $\frac{1}{4}$  inches. As to two of them, it was under 3 feet 6 inches; the lowest being 3 feet 5 $\frac{1}{2}$  inches. The distances on the Michigan Central Railroad run from 3 feet 5 $\frac{1}{2}$  inches to 3 feet 7 inches. The distance between the side of the cab on the engine in which the decedent was acting as fireman at the time of the accident, and the outer end of the upper arm when in position, was 1 foot 1 $\frac{1}{2}$  inches, or 13 $\frac{1}{2}$  inches, with the other distance at 3 feet 5 $\frac{1}{2}$  inches. Said arm in position came a little above the center of the side window in the cab. According to the testimony of defendants' master car builder, who was familiar with the government regulations, and under whose supervision mail catchers were attached to the mail cars, the mail cranes on defendants' road could not be placed further away from the track and be used with the catcher. No one testified that they could be, and there was no fact proven from which an inference could be drawn that they could be. The carpenter, before referred to, who had seen the mail crane at Climax work, and examined it, was asked by plaintiff's attorney whether the mail crane could be put further away from the track, and still do the work of taking the mail as the trains went by; but, upon objection of defendants, the court refused to permit him to answer the question. This is the case upon which the lower court sustained defendants' motion to instruct the jury to find for defendants.

George Weadock, for plaintiff in error.

Harrison Geer, for defendants in error.

Before SEVERENS, Circuit Judge, and WANTY and COCHRAN, District Judges.

COCHRAN, District Judge, after stating the facts as above, delivered the opinion of the court.

It is urged as ground of reversal of the judgment of the lower court that it erred in giving the peremptory instruction. The grounds upon which it was requested by defendants were three: That, as a matter of law, defendants had not been guilty of negligence; that, likewise, decedent had assumed the risk of the proximity of the mail crane to the track; and that, likewise, if defendants had been guilty of negligence, decedent had been guilty of contributory negligence. The lower court, in giving that instruction, gave no intimation, so far as the record shows, as to the ground of its action. There was room for it to have been based on the last ground urged by the defendants. The distance from the side of the cab to the outer end of the upper arm of the mail crane, when in position to deliver the mail, the distance out of the cab window which a fireman would have to project his head to see signals, and decedent's knowledge of the existence of

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the mail crane at that station, and its proximity to the track, when in such position, here assumed, hereafter shown, tend to establish negligence on decedent's part, even though it may have been proper for him to look out of the window for that purpose at all. But it is unnecessary to decide whether this position was well taken or not, for we are clear that the defendants were entitled to the peremptory instruction upon the other two grounds urged.

The negligence which it was claimed by plaintiff the defendants had been guilty of, and which had caused decedent's death, was a failure to use due care to provide him a reasonably safe place in which to work. He claimed that the place in which the decedent was set to work was not reasonably safe, because of the too close proximity of the mail crane, when in position, to the track, and that, if defendants had used due care, it would not have been so. Even if this were true, the plaintiff was not entitled to recover, because the decedent had assumed the risk of that lack of safety. He had assumed it because he knew of it, and he knew of it because it was obvious and he had had ample opportunity to observe it. It is a general rule in the law of master and servant that the latter assumes all the risks he runs whilst in the former's service by reason of the condition as to safety of the place in which, or the appliances with which, he is set to work, of which he has knowledge. It makes no difference whether the place or appliances are as safe as can be, reasonably safe, or not reasonably safe, provided he knows the lack of safety, whatever it is, and the risks he runs on account of it. It is likewise as a general rule thereof that a servant is presumed to know any lack of safety that exists in the place in which, or the appliances with which, he is set to work, and the risk therefrom, which is obvious to one of his intelligence and experience, and which he has had an opportunity to observe. These two general rules have been applied or recognized by the supreme court of the United States, by this court, and by the supreme court of Michigan, within whose jurisdiction the accident happened.

In four distinct cases the supreme court held that, as a matter of law, no recovery could be had for injuries to a servant occasioned by the lack of safety of the place in which he was set to work, because, presumptively, he knew thereof and the risk due thereto, and had assumed that risk. They are the cases of *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; *Tuttle v. Railroad Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114; *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. Ed. 150; *Southern Pac. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391.

In the *Randall* and *Tuttle* Cases the servant injured was a brakeman, in the *Kohn* Case he was a switchman, and in the *Seley* Case he was a conductor acting as a brakeman. In all of the cases save the *Kohn* Case the lack of safety was in

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the track, or some connection thereof. In the Randall Case a ground switch was located in a space between two tracks six feet wide, and the brakeman, whilst unlocking it to allow his train to pass on one track, stationed himself near the other track, and was struck by an engine thereon. Concerning his knowledge of the lack of safety and risk, Mr. Justice Gray said:

"Although it was night, and the plaintiff had not been in this yard before, his lantern afforded the means of perceiving the arrangement of the switch and the position of the adjacent tracks."

Concerning his assumption of the risk, he said:

"A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another, and any one who enters the service of a railroad corporation in any work connected with the making up or moving of trains assumes the risk of that condition of things."

Though not pertinent here, it may not be out of place to quote, as bearing on decedent's conduct, Mr. Justice Gray's reference to the brakeman's choice of position in that case. He said:

"It could have been safely and efficiently worked by standing opposite the lock, midway between the tracks, using reasonable care; and it was unnecessary in order to work it to stand, as plaintiff did, at the end of the handle next the adjacent track."

In the Tuttle Case the brakeman was caught and crushed between two cars, on a siding containing a very sharp curve, which he was attempting to couple from the inner side of the curve. The coming together of the cars was due to the fact that the curve in the track caused their drawheads to pass each other, and not to meet. The coupling could have been made safely from the outer side of the curve. Concerning the brakeman's knowledge of the lack of safety and risk, Mr. Justice Bradley said:

"Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed. One of these dangers was that of the drawbars slipping and passing each other when the cars were brought together. It was his duty to look out for this and avoid it. The danger existed only from the inside of the curve. This must have been known to him. It will be presumed that, as an experienced brakeman, he did know it; for it is one of those things which happen in the course of his employment under such conditions as existed here."

Concerning his assumption of the risk, he said:

"Tuttle, the deceased, entered into the employment of the defendant, as a brakeman in the yard in question, with a full knowledge (actual or presumed) of all these things,—the form of the side tracks, the construction of the cars, and the hazards incident to the service. Of one of those hazards he

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was unfortunately the victim. The only conclusion to be reached from these undoubted facts is that he assumed the risks of the business, and his representative has no recourse for damages against the company."

In the Seley Case the conductor, whilst attempting to make a coupling, caught his foot in an unblocked frog, and was run over and killed. Concerning his knowledge of the lack of safety and risk, because of which it was held that he had assumed the risk, Mr. Justice Shiras said:

"The evidence showed that Seley had been in the employ of the defendant for several years as brakeman and as conductor of freight trains; that his duty brought him frequently into the yard in question to make up his train; that he necessarily knew of the forms of frogs there in use; and it is not shown that he ever complained to his employers of the character of frogs used by them. He must therefore be assumed to have entered and continued in the employ of the defendant with the full knowledge of the dangers asserted to arise out of the use of unblocked frogs."

In the Kohn Case the lack of safety was in freight cars by which the switchman was injured whilst attempting to couple them. It consisted in their having double deadwoods, or bumpers of unusual length, to protect the drawbars. By far the larger number of cars which passed through that yard had none of these deadwoods or bumpers, but the switchman had in fact seen and coupled cars like those that caused the accident, and that more than once. Concerning his knowledge of the lack of safety and risk, and assumption of the risk, Mr. Justice Brewer said:

"But all this was obvious to even a passing glance, and the risk which there was in coupling such cars was apparent. It required no special skill or knowledge to detect it. The intervenor was no boy placed by the employee in a position of undisclosed danger, but a mature man doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to any one. Under those circumstances, he assumed the risk of such an accident as this, and no negligence can be imputed to the employer."

In each one of these four cases, though there was lack of safety in the particulars pointed out, the places in which the servants were at work when injured were reasonably safe, or there was evidence to that effect. In the Randall Case, Mr. Justice Gray said:

"The switch was of a form in common use, and was, to say the least, quite as fit for its place and purpose as an upright switch would have been."

In the Tuttle Case, Mr. Justice Bradley said:

"Although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it



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shall use in its freight depots and yards, where the safety of passengers and the public is not involved,—much less, that it should be left to the varying and uncertain opinions of juries to determine such an engineering question. \* \* \* The interest of railroad companies themselves is so strongly in favor of easy curves, as a means of facilitating the movement of their cars, that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of their business in yards, etc. It must be a very extraordinary case, indeed, in which their discretion in this matter should be interfered with, in determining their obligations to their employees."

In the Kohn Case, Mr. Justice Brewer said:

"It is not pretended that these cars were out of repair or in a defective condition, but simply that they were constructed differently from the Wabash cars, in that they had double deadwoods, or bumpers of unusual length, to protect the drawbars."

And in the Seley Case, Mr. Justice Shiras said:

"In this disputable state of the facts, the defendant asked the court to charge the jury as follows: 'The jury are instructed that if they find from the evidence that the railroad companies used both blocked and the unblocked frog, and that it is questionable which is the safest or most suitable for the business of the roads, then the use of the unblocked frog is not negligence, and the jury are instructed not to impute the same as negligence to the defendant, and they should find for the defendant.' This prayer should have been given by the court."

In three cases the supreme court refused to hold that, as a matter of law, the injured servant had assumed the risk due to lack of safety in the appliances with which or places in which he had been set to work, and held that it was for the jury to determine that question. They are the cases of *Hough v. Railroad Co.*, 100 U. S. 213, 25 L. Ed. 612; *Railroad Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Railroad Co. v. Archibald*, 170 U. S. 670, 18 Sup. Ct. 777, 42 L. Ed. 1188. In these cases the appliances or places in question were not reasonably safe. In the *Hough Case* the court so acted because there had been a promise to repair. In the *MaDade* and *Archibald Cases* it did so because the knowledge by the servant of the lack of safety and the risks arising therefrom was a disputable fact in the case. In the *McDade Case* a blacksmith was injured whilst attempting to put a belt on a moving pulley. Mr. Justice Lamar said:

"Upon every question in the case—the safety and unsafety of the machinery, the ignorance on the part of the plaintiff of the danger of it, and the negligence of the plaintiff at the time of the accident—the evidence is controverted."

In the *Archibald Case* a switchman, in order to uncouple cars by removing the coupling pin which held them together,



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was compelled to go between them,—the lever by which it could have been removed without going between being out of order,—and, whilst so attempting to remove it, his feet were caught by a broken brake rod, with links of chain attached to it, and a hook at its end, which was hanging down under one of the cars, and, in the movement of them, was projected out into the space between; and, in attempting to escape being thrown down, his right arm was caught between the draw-head and crushed. In all three cases, however, the correctness of said two rules were presupposed or recognized. In the McDade Case, Mr. Justice Lamar said:

"If the employer fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was or ought to have been known to him, and was unknown to the employee or servant. But if the employee knew of the defect on the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he must have been deemed to have assumed the risk of all danger reasonably to apprehended from such use, and is entitled to no recovery."

In the Archibald Case, Mr. Justice White said:

"Where an employee receives for use a defective appliance and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used."

And again:

"Where an appliance is furnished an employee, in which there exists a defect known to him or plainly observable, he cannot recover for an injury caused by such defective appliance, if, with the knowledge above stated, he negligently continues to use it."

This court has likewise applied and recognized these two rules in cases that have come before it. In one case only has it had occasion to decide, as a matter of law, that the servant knew of and had assumed the risk. This it did in the case of *Crude Oil Co. v. Grable*, 36 C. C. A. 94, 94 Fed. 73. There an engineer of a stationary engine had been injured by contact between projecting bolts on the rim of a revolving wheel and an adjacent water-pipe line. Judge Clark said:

"Notwithstanding the general rule requiring the master to furnish a safe working place and safe instrumentalities, the servant, in addition to the ordinary perils incident to the business, assumes the risks arising from obvious, patent defects in the things which he uses, and which are known or should be known to him."

And again, in referring to the case in hand, he said:

"The position of the water pipe and the revolving wheel being visible and patent, such danger as existed on account of this situation was just as obvious to and as easily compre-

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hended by the servant as the master. The duties of the servant brought him in daily contact with the machinery, and furnished him constant opportunity to inspect the same. His means of knowledge were evidently superior to those of the master. Notwithstanding that the defect was open, patent, and constant, and the servant's knowledge not only equal, but superior, to that of the master, defendant in error is forced into the dilemma of maintaining that the danger of such a defect was one which the master was bound to anticipate, while the servant was not. This contention is evidently unsound, as will be recognized by its simple statement, without more. The servant was a mature man and a skilled engineer, whose duty brought the patent conditions and dangers constantly under his notice and during a long service. Under such circumstances, if the servant is not bound to anticipate and appreciate the danger, no grounds can be suggested on which the master is required to do so. If the knowledge and means of knowledge of the servant in respect to a patent defect are equal or superior to those of the master, there can be no recovery,—certainly so in the ordinary case."

In the case of *Railroad Co. v. Hennessey*, 38 C. C. A. 307, 96 Fed. 713, this court held that a servant had, as a matter of law, assumed the risk arising from a lack of safety in that with which he had to do in the course of his employment, though he was ignorant of the particular lack of safety through which he was injured. This was because it was a part of his employment to handle that which was in an unsafe condition. In the case of *Narramore v. Railroad Co.*, 37 C. C. A. 499, 96 Fed. 298, 48 L. R. A. 68, it held that the servant had not and could not have assumed, as a matter of law, the risk through which he was injured, because the lack of safety out of which it arose, to wit, an unblocked guard rail, was in violation of statute. It was recognized, however, that if it had not been for the statute it would have to be held, as a matter of law, that the risk had been assumed, because of the servant's presumptive knowledge of the risk, and this notwithstanding the fact that he had testified that he had had no knowledge thereof. Judge Taft said:

"In the absence of the statute, and upon common-law principles, we have no doubt that in this case the plaintiff would be held to have assumed the risk of the absence of the blocks in the guard rails and switches of the defendant. His denial of knowledge of the fact that the rails and switches of plaintiff generally were unblocked is entirely immaterial. Nor is his vague statement that he was so busy as not to notice whether the rails and switches of plaintiff generally were unblocked in a yard where there were hundreds of guard rails and switches, and in which he was constantly at work for seven months, of more significance or weight. His evidence upon this point is not creditable to him. He could only have been ignorant of the admitted policy of the defendant in re-

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spect to blocks through the grossest failure of duty on his part in a matter that much concerned his personal safety and the proper operation of the road. In such a case the authorities leave no doubt that the servant assumes the risk of the absence of the blocks."

In a number of cases this court has refused to hold, as a matter of law, that the servant had assumed the risk through which he was injured. This it did in these cases: *Norman v. Railroad Co.*, 10 C. C. A. 617, 62 Fed. 727; *Railroad Co. v. Thompson*, 27 C. C. A. 333, 82 Fed. 720; *Railway Co. v. Keegan*, 31 C. C. A. 255, 87 Fed. 849; *Clow & Sons v. Boltz*, 34 C. C. A. 550, 92 Fed. 572; *Railroad Co. v. Yockey*, 43 C. C. A. 228, 103 Fed. 265; *Railroad Co. v. Miller*, 43 C. C. A. 436, 104 Fed. 124; *Felton v. Girardy*, 43 C. C. A. 439, 104 Fed. 127; *Railroad Co. v. McDade*, 50 C. C. A. 591, 112 Fed. 888.

In the *Norman*, *Keegan*, and *Boltz* Cases, it refused to so hold because knowledge of the risk was a disputable fact, its obviousness and the opportunity of observing it not being such that it was to be presumed; in the *Thompson* Case, because, whether the injury was due to the risk assumed was disputable; in the *Yockey* Case, because the question as to whether the servant had had a reasonable opportunity to quit after becoming aware of the risk was disputable; and in the *Miller* and *Girardy* Cases, because knowledge of the risk, on account of the lack of experience of the servants who were injured through it, was a disputable fact. Of all the cases in which this court refused to so hold, probably the *McDade* Case needs most to be distinguished from the one in hand. This is because the railway servant in that case had been injured by a structure alongside the track. He was a brakeman, and whilst on the top of a car, signaling to the engineer with his lantern over the side thereof, he was struck by a waterspout projecting unnecessarily close to passing cars. Though an experienced brakeman, he had been on the road in question but a short time. He had been over the division where the waterspout was located not more than eight or ten times, equally divided between day and night trips. This was the only waterspout which it was shown projected so close to passing cars, and the car upon which the brakeman was located when struck was a furniture car, which was higher and wider than the average freight car. Judge Lorton said:

"McDade was entitled to rely upon the company's having properly constructed this spout, and the danger from the proximity of this particular spout was by no means so obvious, especially in view of McDade's short experience on this part of the road, as to charge him with having assumed the risk."

These cases all recognize, however, that, as a general rule, a servant assumes the risks of which he has knowledge, and that he is presumed to know the risks that are obvious and that he has had an opportunity to observe.



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These principles have been recognized and applied by the supreme court of Michigan, within whose jurisdiction the accident in question happened, in these cases: *Illick v. Railroad Co.*, 67 Mich. 632, 35 N. W. 708; *Pennington v. Railway Co.*, 90 Mich. 505, 51 N. W. 634; *Ragon v. Railway Co.*, 97 Mich. 265, 56 N. W. 612, 37 Am. St. Rep. 336; *Manning v. Railway Co.*, 105 Mich. 260, 63 N. W. 312; *Phelps v. Railway Co.*, 122 Mich. 171, 81 N. W. 101, 84 N. W. 66; *Potter v. Railway Co.*, 122 Mich. 179, 81 N. W. 80, 82 N. W. 245; *Pahlan v. Railway Co.*, 122 Mich. 232, 81 N. W. 103.

The exemption of a master from liability for injuries to a servant occasioned by the lack of safety in his working place or appliances, on the ground that the servant has assumed the risk thereof, does not come within the principle of those cases which hold certain contracts void, as against public policy, which provide for exemption from liability for injuries due to negligence. *Railroad Co. v. Voight*, 176 U. S. 505, 20 Sup. Ct. 385, 44 L. Ed. 560.

Such, then, being the settled law in regard to the assumption by a servant of the risks of his employment of which he knows, and as to his presumptive knowledge thereof, it follows that if the proximity to the track of the mail crane in question, when in position, and the risk of coming in contact with it and being injured, were obvious to one of decedent's intelligence and experience, and he had had an opportunity to become aware of them, it should be presumed that he did know of them, and should be held that he had assumed the risk.

The decedent was 32 years of age. The evidence is not definite as to the extent of his railroad experience. He had been a fireman on defendants' road for not quite a year. According to the testimony of his widow, he had acted as a fireman in the yard at Durand, doing some extra running, for seven or eight months, which was probably immediately preceding his going upon the road. There is no evidence of his having had any previous railroading experience. During all the time he was on the road, the mail crane in question had been located at Climax, the same distance from the track. He had passed there 83 times, in all, on both freight and passenger trains,—mostly on freight; but the opportunity of observation as to the proximity of the mail crane was practically as good on freight as on passenger trains, some, if not many, of which trips, no doubt, were in the nighttime. The mail crane in question was one of a number of other mail cranes on the same division, and on the other division over which he had made 123 like runs, and they all were substantially of the same proximity to the track as this one. In that time there had been no increase in the size of the engines. There can therefore be no doubt that the proximity of the mail crane in question to the track, and the risk of coming in contact therewith and suffering harm therefrom, were per-

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fectly obvious to decedent, and that he had had ample opportunity to observe them. It must be held, therefore, that he knew of that risk and assumed it. It is probable that he did not know the exact distance between the side of the cab and the outer end of the upper arm of the mail crane when in position, but he knew that it was sufficiently close to be dangerous if he put his head out too far. It is true, also, that it was dark and blowing hard, and, to some extent, snowing. Had he never been over the road before, or but a few times, these circumstances might have been pertinent, as bearing upon the question as to whether he knew of the proximity of the mail crane to the track, and the risk thereof; but where, as here, previous knowledge thereof is clearly shown, the sole effect of these circumstances was to render it incumbent on decedent to use extra precaution to prevent injury therefrom. He knew that he was on a fast passenger train, and that the mail cranes along the road would be up in position to deliver their mail to it, and, with this knowledge, he should not have placed his head so as to come in contact with them. No fact or circumstance was proven in the case that rendered it necessary that he should have put his head out so far as to be struck by it.

But the defendants were entitled to the peremptory instruction not only on the ground of assumed risk, but also on the ground that the defendants had not been guilty of negligence toward him. This follows from the fact that decedent had assumed the risk of the proximity of the mail crane to the track. The master owes no duty to a servant to remove a risk that he has assumed, and hence is not negligent towards him in failing to remove it. Saying that a servant has assumed a risk is but another way of putting it that the master has not been negligent in not removing the risk. Valentine, J., in the case of *Rush v. Railway Co.*, 36 Kan. 129, 12 Pac. 582, said:

"Culpable negligence on the part of one person as towards another always involves a breach of duty on the part of the former as towards the latter. Where there is no breach of duty, there can be no culpable negligence, and it is only for negligence of a culpable character that any person can be held responsible in law. Where an employee is hired and paid for assuming a known danger, and the thing itself is not contrary to law, it cannot be properly said that the hirer has been guilty of any breach of duty as towards the person hired, and therefore it cannot be said that the hirer has been guilty of any culpable negligence as towards the person hired."

In the *Narramore Case*, *supra*, Judge Taft said:

"Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the



servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers, the risk of which he agreed, expressly or impliedly, to assume. The master is not, therefore, guilty of actionable negligence towards the servant. This is the most reasonable explanation of the doctrine of assumption of risk."

And in the Kohn Case, *supra*, Mr. Justice Brewer said: "Under those circumstances he assumed the risk of such an accident as this, and no negligence can be imputed to the employer."

There was, however, no failure on the part of the defendants to use due care to provide the decedent a reasonably safe place to work, in this particular. Notwithstanding the proximity of the mail crane to the track, and the liability of a negligent fireman coming in contact with it when in position, it was reasonably safe. According to the testimony of defendants' master car builder, who was familiar with the government regulations in such matters, and under whose supervision the catchers were constructed upon the mail cars, and who was therefore an expert in such matters, the mail cranes could not be placed at a greater distance and operated efficiently. The place in which decedent was set to work was, then, according to this opinion, as safe as it could be made, consistently with provision being made for fast passenger trains taking up the mail at small stations without having to stop to do so. In addition to this, all other mail cranes on defendants' road and those upon the Michigan Central and Pere Marquette Railroads were located at substantially the same distance from the track as the one in question. There was no testimony to the contrary of this. The carpenter at Climax, who had seen the mail crane in question work, and examined it, was asked by plaintiff, in substance, whether it could have been placed farther away from the track, and still do the work of delivering the mails to the trains as they passed by. But upon objection by defendants, the court refused to permit the question to be answered. This ruling was excepted to, and has been assigned as error. It does not appear from the record what answer the witness would have made to the question if he had been permitted to answer. And even if it did appear that he would have answered it in the affirmative, we think the court's ruling was correct. It was not shown that he had sufficient knowledge in regard to the matter to be entitled to give an opinion as to it. Such knowledge as he had was confined to the mail crane. It was not shown that he had any knowledge in regard to the mail catcher and its workings, except, perhaps, to see it catch the mail as the train passed by. Besides, if admitted, it would have been

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entitled to no weight whatever as against the action of the defendants and the Michigan Central and Pere Marquette Railroad Companies as to all the mail cranes located on their roads. In the Randall Case, *supra*, plaintiff and another brakeman had testified that the switch which the plaintiff was attempting to unlock when injured was not properly constructed and arranged, and that it should have been an upright switch, instead of a ground one. Concerning this testimony, Mr. Justice Gray said:

"There was no sufficient evidence of any negligence on the part of the railroad company in the construction and arrangement of the switch to warrant a verdict for the plaintiff on that ground. The testimony of the plaintiff and his witness was too slight."

In the Tuttle Case, Mr. Justice Bradley said:

"The interest of railroad companies themselves is so strongly in favor of easy curves, as a means of facilitating the movement of their cars, that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of their business in yards, etc. It must be a very extraordinary case, indeed, in which their discretion in this matter should be interfered with, in determining their obligations to their employees."

And in the McDade Case, in this court, Judge Lurton said:

"If it had appeared that there was a uniform custom on well-managed railroads to construct such swinging water-spouts in such proximity to passing cars as to endanger employees standing or sitting on the roofs of such cars while in the discharge of their duty, no legal imputation of negligence would, perhaps, arise from such a construction, however unnecessary such dangerous proximity might be."

Still further, as we have shown and the above quotation indicates, it was an immaterial question in the case whether the mail crane could have been placed farther back from the track, and the mail delivered efficiently. The decedent knew its actual proximity to the track, and assumed the risk thereof. In view of all these considerations, it must be held that the ruling of the court was correct. At any rate, it cannot be said that it was clearly erroneous. In the case of *Manufacturing Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1035, Mr. Justice Gray said:

"Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial, and his decision of it is conclusive, unless clearly shown to be erroneous in matter of law."

It must be held, therefore, that there was no failure on defendants' part to use due care to place the mail crane in question at a reasonably safe distance from the track.

It was proven that the mail crane was not lighted, and the point is made that defendants were negligent in not causing it

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to be lighted. We have heretofore directed attention to the sole significance of the fact that the night was dark, and it was perhaps snowing to some extent. As to the claim that the mail crane should have been lighted, the defendants had a right to act upon the idea that decedent, being aware of the proximity of the mail crane to the track, would conduct himself in such a way as not to come in contact with it. In the case of *Brown v. Railroad Co.*, 69 Iowa, 161, 28 N. W. 487, a fireman had been killed by coming in contact with a snow bank close to the railroad, and one of the particulars in which it was claimed that the defendant company had been negligent was in failing to place danger signals upon the snow bank. Rothrock, J., said:

"He knew of the existing of the banks of snow in close proximity to the track, and with this knowledge, as we held on the former appeal, he assumed the risk of the danger attendant upon the condition of the road in this condition. He must be held to have the same knowledge of this danger as he had of the close proximity of cattle chutes, coal sheds, platforms, bridges, water pipes, or other structures and appliances necessarily located in close proximity to the track, which may be passed in perfect safety so long as employees keep themselves within line of the cars in the train, but which are dangerous when an employee exposes himself to contact with them by swinging outside of the line of the train. And there is no rule of diligence which requires railroad companies to place signals at snow banks by flags in daylight and lanterns at night, to protect trainmen from injury, that would not also require them to do so at other objects near the track."

Our conclusion, therefore, is that there was no failure on the part of the defendants to use due care to provide the decedent a reasonably safe working place, and that on this ground, as well as upon the ground that decedent had assumed the risk of such lack of safety as there was in that place, the defendants had been guilty of no negligence towards the decedent, and because of this were entitled to the peremptory instruction given.

Three cases have been cited to us, involving injuries to railroad employees by mail cranes located alongside the railroad tracks. They are the cases of *Railroad Co. v. Gregory*, 58 Ill. 272; *Sisco v. Railway Co.*, 145 N. Y. 296, 39 N. E. 958; *Railroad Co. v. Milliken's Adm'x* (Ky.) 51 S. W. 796. The question of assumption of risk does not seem to have figured in either one of them. The sole question in each one seems to have been as to the railway company's negligence. The *Sisco Case* is in accord with the position we have taken on that question, and the *Gregory* and *Milliken Cases* are not contra.

In the *Sisco Case* a brakeman, whilst climbing up the side of a car, was struck by the upper arm of a mail crane which was stationary, and the distance from the outer end of which

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and the side of the car was 12 inches. The defendants' evidence showed that cranes of similar construction were in use on many other railroads. There was no evidence that the crane, if placed further from the track, would have performed its work. The mail crane had been erected only a short time before the injury. It was held that the plaintiff was not entitled to recover, because there was no evidence of failure to use due care on defendants' part. Andrews, C. J., said:

"The employer does not undertake with the employee that he will use the very best appliances; nor is he called upon to discard machinery adopted by him in his business, reasonably suited therefor, although there may be other machinery that may be safer. It is bound to the exercise of reasonable care in providing machinery and appliances, in view of all the circumstances. Still less is the master to be cast in damages for error of judgment in selecting one method of prosecuting his business, or one kind of machinery or appliance, on proof that another method or appliance is better or safer, when both methods or both kinds of appliances are in common use. *Frace v. Railroad Co.*, 143 N. Y. 182, 38 N. E. 102; *Flinn v. Railroad Co.*, 142 N. Y. 11, 36 N. E. 1046. It was not found, nor was there any evidence upon which a jury could infer, that the crane in question could be placed any further from the track than it was, and perform the function for which it was designed. Plaintiff was bound to show a state of facts indicating negligent construction or location, to raise a question for the jury upon this point. It was not sufficient for him to show an injury, or that operating the device involved danger to the brakeman. He took the risk of all constructions necessary and reasonably adapted to the business of the railroad. The burden was upon him to show that the appliance, concededly useful in the business of the defendant, was improperly constructed or located, and this he wholly failed to do. Proof that it was dangerous was not enough. He was bound to go further, and show that the defendant might, by the use of reasonable care, have accomplished its purpose, and at the same time protected its employees from the danger."

In the *Gregory* and *Milliken* Cases it was held that the questions of negligence and contributory negligence were for the jury. Judge Scott, in the former case, thus summarized the facts thereof:

"It most satisfactorily appears that in general those inventions for the delivery of the mails are not dangerous to the operations of the road. They have been and can be placed at a distance from the track that would be entirely safe, and still perform their proper functions. If such was not the case, it would be the duty of the company to abandon their use. There is evidence tending to show that the one at Cliola station was dangerous; that it had produced one or more injuries; and there is also evidence tending to show that the company



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had knowledge of that fact in ample time to have removed it to a safe distance, so as to have prevented the death of Burnett. The significant fact appears, and no reasoning, however ingenious, can destroy its force, that after its removal for only a distance of a few inches it was and has been perfectly safe, and no accident has since occurred from its use."

The employee injured in that case was a fireman, and the distance between the end of the arm and the side of the coaches was 7 to 10 inches, varying according to the construction of the different coaches. In making this quotation, we would not be understood as approving the statement therein that, if such useful instrumentalities as mail cranes could not be placed at a distance that was entirely or perfectly safe, they should be abandoned.

In the Milliken Case a brakeman who was sitting on the top of a freight car, with his feet hanging over the side, was knocked off and killed. This extract from the opinion by Judge Hobson is sufficient to differentiate that case from this, to wit:

"There was evidence that the crane was not upright, but leaned towards the road about four inches. The swing of the arms and the hanging of the bag, always on the side next to the road, would have a tendency to pull the upright post over. This would throw the bag nearer the car, the greater the inclination became. It was in proof that this crane was set some four and one-half inches nearer the track than the other cranes from which the mail was taken. If this proof was true, this mail bag hung something like eight inches nearer the track than required by the government; and if it had hung eight inches further off, from the photographs exhibited, it would seem that the intestate would not have been knocked off. We cannot say that the defendant might, by the use of reasonable care, have accomplished its purpose, and at the same time protected its employees from the injury."

The Sisco Case was cited, approved, and distinguished. The judgment of the court must be affirmed.

## CHICAGO TERMINAL TRANSFER R. CO. v. STONE.

(Circuit Court of Appeals, Seventh Circuit, June 12, 1902.)

[118 Fed. Rep. 19.]

## Injury to Servants—Car Repairers—Negligence—Question for Jury.

3 Burns' Rev. St. Ind. 1894, § 7083, declares that railroad corporations shall be liable for injuries suffered by employees while in its service, such employee being in the exercise of due care, where such injury was caused by the negligence of any person in the service of such corporation, who had charge of any locomotive, engine, or train, or where such injury was caused by the negligence of any person, co-employee, or fellow servant at the time acting in the place and performing the duty of the corporation in that behalf: *held*, that



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where an engine was sent out in charge of a young "hostler" to switch certain cars, with no helper in the cab, and with a workman from the shops to serve as a switchman, and the train was backed to a switch where certain cars to be repaired had been left standing, bearing a red flag in plain view, which denoted that repairers were at work on the cars, and, though the engineer noticed that the cars were "pretty close" to his track, and brought the train to a stop within a short distance of the danger point, he continued to back in response to a signal from such switchman, without looking to ascertain the safety of his act, by reason of which the cars on the repair track were put in motion, and plaintiff's intestate, a car repairer at work under the cars, was killed, there was no error in refusing to direct a verdict for the defendant and submitting the case to the jury.

**Appeal—Instructions—Exceptions at Trial.**

Where no exceptions were taken to instructions given at the trial, and no instructions were requested, the instructions so given cannot be reviewed on appeal.

**Injury to Employee—Contributory Negligence.**

Plaintiff's decedent, a car repairer, was ordered to repair certain cars which had been placed on a repair track by the company's yard foreman, and a red flag was placed on the end car to indicate that car repairers were at work under the cars. The cars were struck by another train on another track, by reason of their being too close to the switch to clear, and deceased was killed: *held*, that deceased was not guilty of contributory negligence.

**Evidence—Variance—Verdict.**

Where testimony is received without objection, a verdict founded upon it will not be disturbed, though the evidence is not strictly within the allegations of the complaint, since the pleading could be amended to conform to the proof.

**Appeal—Objections to Evidence.**

The admission of evidence at the trial cannot be reviewed on appeal, in the absence of objections interposed at the time the evidence is offered.

**Evidence—Res Gestæ.**

In an action for the death of a car repairer, caused by the alleged negligence of a roundhouse "hostler," sent out in charge of a switch engine, without a fireman, an interrogatory, on cross-examination, as to who sent the witness out without a fireman, was admissible as part of the *res gestæ*.

**In Error to the Circuit Court of the United States for the District of Indiana.**

The defendant in error was the plaintiff below, and recovered judgment upon a verdict against Chicago Terminal Transfer Railroad Company, plaintiff in error and defendant below (hereinafter mentioned as the defendant), in an action founded upon the alleged negligence of the defendant in switching operations, whereby the decedent, Leonard Vanderhere, received injuries which caused his death. The complaint alleges that the decedent was a car repairer in the service of the defendant, and that his injuries were received while "actually engaged in repairing cars upon said company's yard tracks, under the direction and orders of said defendant's foreman, then and there in charge of said yards and roundhouse," and thus states the cause of injury: "That upon said 28th day of March, 1900, while said decedent was then and there under one of said cars, and was then and there

engaged in repairing the same, the said defendant company, by and through its servants, who were then and there in the service of said defendant corporation, and then and there had charge of and control of a locomotive engine and train upon said railroad, carelessly and negligently ran said locomotive engine and train of cars against the line or string of cars then and there located upon said side track or repair track, one of which string or line of cars was then and there being repaired by said decedent as aforesaid, and then and there and thereby carelessly and negligently pushed and knocked said car, under which said decedent was then and there at work, down upon said decedent, and then and there wounded, bruised, lacerated, and injured the head, trunk, and limbs, and the bones, muscles, flesh, tendons, ligaments, veins, arteries, nerves, and organs, of said decedent's body, to such an extent and in such manner as then and there to kill and cause the death of said decedent. That the said engineer and the said Leonard Vanderhere, decedent, were then and there both acting in the line of their respective duties as employees of said defendant company." An amended complaint was tendered before the close of the trial, alleging negligence on the part of the switchman in conforming with the evidence, but was disallowed by the court on the ground that the original "allegations were broad enough to recover it."

A statute of Indiana (section 7083, 3 Burns' Ann. St. 1894) provides that such corporations "shall be liable in damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence," in certain cases stated, including the following: "(4) Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round-house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employee or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employee, or fellow servant, at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws."

Jesse B. Barton, for plaintiff in error.

James W. Noel and A. F. Knotts, for defendant in error.

Before JENKINS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge (after stating the facts as above).

The assignment of errors, though varied in form, presents two questions only for review: Whether the trial court erred

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(1) in refusing to direct a verdict for the defendant, or (2) in overruling an objection to testimony brought out on the cross-examination of the witness Larson, called by the defendant.

1. The fact that Leonard Vanderhere, the decedent, received the injury from which he died while engaged in the line of duty as car repairer in the defendant's service, and the circumstances under which such injury occurred, are substantially undisputed. The injury arose in Indiana, and was caused by the alleged negligence of one or more "persons in the service of such corporation,"—that is, by failure to exercise the care and skill which the circumstances and nature of the service demanded,—and the case is subject to the provisions of the Indiana statute above stated. If the alleged cause of action is established by competent testimony and within the terms of this statute, it is plain that the peremptory instruction requested on behalf of the defendant was rightly denied. The injury in question occurred under the following circumstances:

The foreman of yards and repairs had set out a string of eight gondola cars to be repaired, on an east and west track used for that purpose, called in the testimony the "Sand-House Track." At the east end of this track was the switch which connected with the track adjoining on the south, referred to as a "Repair Track." Directed by this foreman, Vanderhere, the decedent,—who is designated by the foreman as "helper," because he had served with the company two weeks only,—proceeded with Stone, another car repairer, to repair these cars, commencing at the eastern end of the string. For this purpose Stone was ordered to separate the four east-most cars, and he pushed them with a pinch bar eastward so that the first car was placed too near the switch for clearance, as the result proved. Such location was examined by the foreman, and if he did not give his approval in terms, as stated by Stone, the foreman testified that he was satisfied it would not foul with cars switching to the "repair track," and so left it. No measurements were taken, nor were the customary tests made to assure that fact. Vanderhere was not present when the cars were separated or moved, and neither observed their location with reference to the switch nor overheard any remarks thereon, but assisted only in the repair work. A red flag was in place on the east car to give the customary notice that car repairers were working on or under the cars. With the cars so standing on the track, and the danger signal well displayed, both car repairers were at work under or between the third and fourth cars, out of view of the approaching danger, when the first car was struck on its corner by a train backing through the switch westward to the "repair track"; and this in broad daylight, with no obstruction to the view from the east except that made by the on-coming train. Impetus was thus given to the standing cars, without warning to the workmen, and caused the fatal injury of Vander-

here; Stone being thrown under the car, but escaping serious hurt.

The train so striking the standing car consisted of a backing engine, pushing a steam shovel car and a flat car loaded with a derrick and other material, and was moving in compliance with a signal given by one Williams, who was sent by the roundhouse foreman to serve as switchman with the acting engineer, Larson, in moving these cars and equipments to the "repair track." Williams was a boiler maker, but had some experience in switching; Larson, whom the foreman sent in charge of the engine, was not an engineer, but an employee in the roundhouse, known as "hostler," and had frequently served in taking out engines and moving cars, though only 20 years of age. On the occasion in question no fireman or helper was furnished Larson, who was alone on the engine. To reach the "repair track," after taking up the cars and their equipments, the train backed westward in the direction of the switch, Williams throwing the switch and signaling the movement. Both Williams and Larson observed the cars standing on the "sandhouse track," and, while Larson is uncertain in his testimony whether he noticed the flag, he says:

"I saw it [the standing car] was pretty close, but I was sure, if the switchman would see that the cars wasn't going to clear," he would "signal to come out."

Williams was on the ground, but was uncertain of clearing,—the difficulty of estimating the safety of movement being increased by a slight curve in the track,—and gave the signal to stop, and the train was stopped within about three car lengths of the standing car. Another examination seems to have satisfied Williams that the train could pass, and he signaled to start; but the movement thereupon quickly indicated danger, and he made confused effort to so signal, but not in time to avert the disaster. Larson testifies that he did not observe that the car fouled his track when he resumed backing in obedience to the signal, for the reason that his station as engineer was on the right-hand (south) side of the engine, and his train intercepted the view, though an unobstructed view was obtainable, as he states, from the north side. Undoubtedly, with a fireman or helper in the cab, to serve as lookout on the other side, as customary in switching operations, the engineer would attend only to that duty on his side, and when left alone on the engine he could not perform for both while running. But the question whether reasonable care is exercised depends for solution in each case on the circumstances, and in the present instance involves these special conditions: That the engine was sent out to switch the cars in charge of a young "hostler," with no helper in the cab, and a workman from the shops to serve as switchman; that the train was backed to the switch when the standing cars bearing a red flag were in plain view, and when the



engineer had noticed that the first "car was pretty close" to his track; that, brought to a stop within a short distance of the danger point, with the acting switchman evidently hesitating as to safe clearance, he obeyed the signal to resume backing, under no stress of emergency, and without looking to ascertain the safety of such move from a viewpoint which was seemingly equal, if not superior, to that of the switchman.

On this state of facts we are of opinion that no tenable ground was presented for directing a verdict in favor of the defendant, and that the only issues arising thereupon were issues of fact,—including legitimate inference of fact from the undisputed circumstances,—and were for the jury to determine, under proper instructions defining the negligence for which liability was imposed by the statute, and the rule and burden of proof in respect of contributory negligence or "the exercise of due care and diligence" on the part of the injured person. Instructions which were given in submitting the case to the jury are preserved in the bill of exceptions; but they are not reviewable, in whole or in part, for the reason that no exceptions thereto were taken on behalf of the defendant, nor were any instructions requested other than the request to direct a verdict for the defendant. The contention that contributory negligence appears on the part of the decedent is wholly unsupported by the testimony. On the main issue of negligence in backing the train which caused the injury, the testimony is undisputed, and, to say the least, clearly tends to establish negligence therein. It was properly left to the jury to ascertain whether any person in charge of the locomotive or train, who thus became the representative of the defendant within the terms of the statute, caused the injury "by carelessness and negligence in running and operating," one or both, and their finding is, in effect, that there was negligence on the part of a servant so in charge.

Upon the assumption that the issue was narrowed by the allegations of the original complaint to negligence on the part of the engineer, as contended on behalf of the defendant, the verdict is supported by testimony from which it is fairly inferable. But it is not necessary to rest the finding on negligence alone of the young man acting as engineer, nor is it just to leave it so implied, in the light of the testimony concerning the relation of the acting switchman to the train and his mistake in giving the signal to move. This testimony was received without objection, and, if not strictly within the allegations of negligence in the complaint, an amendment was proper to conform the pleading to the proof so received; but without an amendment "a verdict founded upon it will be sustained." *Graves v. State*, 121 Ind. 357, 23 N. E. 155, and authorities cited; *Railway Co. v. Shanks*, 132 Ind. 395, 31 N. E. 1111. See *Roberts v. Graham*, 6 Wall. 578, 581, 18 L. Ed. 791; *Railroad Co. v. O'Reilly*, 158 U. S. 334, 335, 15 Sup.



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Ct. 830, 39 L. Ed. 1006. In the present case, however, an amended complaint was duly tendered for that purpose, and was ruled out by the trial court on the ground that the original allegations were sufficient. Assuming (but not intimating) that this ruling was erroneous, it was in no sense harmful to the defendant, and cannot affect the judgment. In any aspect of the testimony, no error was committed in refusing to direct a verdict for the defendant.

2. The remaining assignment of error, based on the cross-examination of the witness Larson, the engineer, called on behalf of the defendant, is without merit. The assignment recites several questions and answers as objectionable matter; but it appears from the bill of exceptions that all were admitted without objection, except in a single instance. It thus appears that no objections were interposed to the following portions of the testimony thus set forth: That he had no fireman on the engine; that he was sent out without one; that it was not customary to send an engine out without a fireman; that if a fireman had been in place on the left hand side of the engine, "I suppose he could," have "seen out of that side of the train," and "whether they would strike or not"; that such duty on the part of the fireman is customary and usual; that from his position as fireman, if he had looked out, he "could have seen whether they were going to clear or not." The only objection made throughout the cross-examination was to this question, "Who sent you out without a fireman?" And the objection was placed on the ground that "there is no charge that this injury resulted on account of negligence in not furnishing a fireman." In ruling thereupon, the court remarked that there was no such charge, but that the inquiry was admissible on the issue of negligence on the part of the engineer; and the answer was allowed, that Mr. Snyder (the roundhouse foreman) so sent him. The question and answer were admissible as part of the *res gestæ*, for the purpose stated, and the instructions clearly limited the testimony to that issue.

Finding no reversible error in the record, the judgment is affirmed.

## MONTPELIER &amp; W. R. R. CO. v. MACCHI.

(*Supreme Court of Vermont, Washington, Aug. 21, 1902.*)

[52 Atl. Rep. 960.]

**Freight—Special Agreement to Pay—Evidence.**

In an action for freight, wherein plaintiff relied on a special promise to pay, made by defendant before the car had gone forward, but after a bill of lading had been issued, providing that the consignee should pay the freight, the bill of lading was admissible as a step in the transaction.

**Same—Prepayment—Evidence.**

It was competent for defendant to testify that, when freight was to be prepaid, it was plaintiff's custom to indicate it on the bill of

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lading, though it appeared that defendant had never before shipped to a prepay station; this circumstance merely affecting the weight of his testimony.

**Same—Same—Same.**

Evidence that defendant had no title to the consigned goods after they were placed in the car was admissible as bearing on the improbability of defendant's promising to pay freight on another's goods.

**Argument of Counsel.**

The case having been submitted to the jury on the theory that plaintiff must prove the special promise, to allow defendant's counsel to state that defendant had lost the chance to protect himself for the freight was error, notwithstanding that there was evidence that plaintiff had delivered the goods to consignee without demanding the freight from him.

**Exceptions from Washington county court; Start, Judge.**

Action by the Montpelier & Wells River Railroad Company against Z. Macchi. From a judgment for defendant, plaintiff brings exceptions. **Reversed.**

Argued before ROWELL, C. J., and TYLER, MUNSON, WATSON, STAFFORD, and HASELTON, JJ.

J. P. Lamson, for plaintiff.

Gordon & Jackson, for defendants.

**STAFFORD, J.** The defendant, a granite worker at Barre, Vt., having a job ready for shipment, called on the plaintiff for a car, and loaded it with his work, taking from the plaintiff's billing clerk a bill of lading, which named a party at West Seneca, N. Y., as consignee, and provided that the freight should be paid by the consignee or owner. The plaintiff's evidence tended to show that soon after issuing the bill of lading, and before the car left the yard, the clerk discovered that West Seneca was a prepay station, i. e. one having no agent to collect freight, so that the car would not be forwarded by connecting roads unless the waybill was marked prepaid, which meant that the freight had been paid or guaranteed by the shipper; that the clerk immediately notified the defendant, and the defendant promised to pay the charges if the plaintiff would forward the car, whereupon the plaintiff did forward the car, marking the waybill prepaid, and afterwards paid the connecting roads the freight charges, which it now seeks to recover from the defendant. The defendant's evidence tended to show that he was not thus notified, and did not so agree, and that the only contract was that shown by the bill of lading. The plaintiff claimed to recover solely by virtue of the special agreement. A verdict was returned for the defendant.

We consider the exceptions in the order in which they are presented by the plaintiff's brief.

1. The bill of lading was properly admitted as one step in the transaction.

2. The defendant offered to show that, when freight was to be prepaid, it was the plaintiff's custom to indicate that fact upon the bill of lading, whereas the bill here contained no

such indication. The court properly ruled that this might be shown; and although the defendant, who so testified upon direct examination, admitted upon cross-examination that he had never shipped to a prepay station except in this instance, that did not make the previous ruling erroneous, but only served to weaken or destroy the witness' testimony.

3. The defendant offered to show that he had no title to the stone after it was loaded on the car. The plaintiff objected that it was immaterial. It was properly admitted, as against that objection, for it might well be argued that the defendant was less likely to have agreed to pay the freight if he had already parted with the title.

4. The testimony here excepted to was admitted as tending to establish the agency of a party whose declarations were to be offered in evidence to bind the plaintiff. But when the declarations came to be offered, they were excluded. So this exception is immaterial.

5. In addressing the jury, defendant's counsel stated that defendant lost the chance to protect himself for the freight, to which plaintiff's counsel objected and excepted. The allowance of the exception, standing, as it did, alone, was a ruling that the statement was proper. Defendant's counsel still insist that it was proper, and for the reason that the evidence tended to show that the railroad delivered the stone to the consignee without first demanding the freight. But the case was submitted upon the theory that the plaintiff must show that the defendant undertook to pay the freight, not that he undertook to pay it if the consignee should fail to do so. Therefore, the defendant had no right to ask the jury for a verdict on the ground that, even if he had promised to pay the freight, he ought not to be compelled to do so, because the plaintiff had failed to require or demand payment of the consignee. Such argument, countenanced and approved by the court, was likely to be prejudicial, and might well prove controlling. This exception must be sustained.

6. The motion in arrest was properly denied, for it reaches only matter of record, and the record in this sense does not include evidence. So, likewise, was the motion to set aside the verdict, no ground being stated therefor; and the motion to render a judgment for the plaintiff notwithstanding the verdict, such a motion being wholly inappropriate in any view of the case.

Judgment reversed, and cause remanded.

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NASHVILLE, C. & ST. L. RY. CO. v. ALABAMA CITY.

(*Supreme Court of Alabama, June 28, 1902.*)

[32 So. Rep. 731.]

#### Railroads—License Tax.

A railroad company's liability to pay a license tax required of a company running cars through it, for transporting freight or pas-

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passengers to or from it, is not affected by its not having an agent or office in the city.

**Same—Same—Interstate Commerce.\***

A city ordinance imposing a privilege tax on a railroad company running cars through the city, for the business of transporting freight or passengers between the city and other points in the state, does not interfere with interstate commerce.

**Same—Same—Reasonableness.**

A privilege tax of \$50 a year required by a city of 2,000 of each railroad company running cars through it, for the business of transporting freight and passengers between it and other points in the state, is not unreasonable, though in the case of one company its receipts in the city do not pay its operating expenses therein.

Appeal from city court of Gadsden; John H. Disque, Judge.

Action by Alabama City against the Nashville, Chattanooga & St. Louis Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

This was a suit by the city of Alabama City, against the appellant, to recover several sums alleged to be due to the plaintiff for license or privilege tax for the defendant engaging in the business in Alabama City of operating its railroad therein, for the transportation of freight and passengers, one or both, to points in the state of Alabama and from other points in the state of Alabama to Alabama City; it being averred in each of the counts of the complaint claiming the privilege tax of \$50 for each of the years in which the plaintiff failed to take out a license, that the defendant had not paid said amount as required by the ordinance of the plaintiff.

The complaint contained three counts, setting out the facts as above stated. The third count of the complaint did not set out the ordinance of the city upon which the claim suit was based, but it stated the substance of the ordinance and averred its violation by the plaintiff. The defendant demurred to the complaint and to each count thereof upon the ground that it did not set out in full the ordinance or ordinances under which the amount sued for or claimed to be due. This demurrer was overruled, and thereupon the defendants pleaded the general issue and several special pleas. The second plea was in words and figures as follows: "(2) That it has not been engaged in the business of running cars through or into Alabama City for the business of transporting freight or passengers one or both from Alabama City to other points in this state, and from other points in this state to Alabama City, but that it runs its trains through the corporate limits of said Alabama City for the purpose of transporting freight and passengers from points outside of Alabama City to other points in this state and other states, (and that it has neither an agent nor an office in said Alabama City, and has not had since the enactment of the ordinances referred to in the complaint)."

\*See *City of York v. Chicago, etc., R. Co.* (Neb.), 14 Am. & Eng. R. Cas., N. S., 200, and note, 208; *Alabama, G. S. R. Co. v. City of Bessemer* (Ala.), 6 Am. & Eng. R. Cas., N. S., 410.



By the third plea, the defendant set up that the ordinance was in violation of the fourteenth amendment of the constitution of the United States, in that the enforcement of the ordinance would deprive the defendant of its property without due process of law, because the defendant has not since the enactment of the ordinance referred to derived a sufficient revenue from the transportation of freight and passengers from Alabama City to other points in the state, and from other points in the state to Alabama City to pay its actual operating expenses.

In the fourth plea the defendant set up that the enforcement of the ordinances referred to in the complaint against the defendant would be in violation of article I of section 10 of the constitution of the United States, because it would impair the obligation of the contract, in that the defendant had obtained through the legislature of Alabama the right to run its trains through the territory embraced within the corporate limits of Alabama City, and the enforcement of said ordinance would prohibit the exercise of the privilege granted it by its charter.

In the fifth plea the defendant pleaded that the plaintiff has no authority under its charter to exact a license tax from this defendant for running its trains through the corporate limits of said city.

In the sixth plea the defendant set up that the enforcement of said ordinance was an interference with interstate commerce.

Plaintiff moved to strike out that portion of the second plea which is within the parentheses, upon the ground that it seeks to present an immaterial and irrelevant issue, and because it was frivolous and impertinent. To each of the other pleas, the plaintiff demurred upon the ground that no one of said pleas set up an answer to the complaint, and that they presented an immaterial issue and that the facts therein set up were not in violation of the constitution of the United States, nor was it an interference with interstate commerce. These demurrers were sustained. The cause was tried by the court without the intervention of a jury, upon an agreed statement of facts. In this agreed statement of facts it was admitted that the defendant was operating a railroad through Alabama City, and was engaged in both state and interstate commerce, and that the defendant had no agent within the corporate limits of Alabama City, nor has it ever had, nor has it had a depot building there for the reception of its freight or passengers; that no tickets are or have been sold to passengers to or from Alabama City, but passengers holding tickets or paying fare to the next regular stations beyond are received or are permitted to get off trains at Alabama City. That all freight shipped for Alabama City both from points within and without the state, is billed to Gadsden, Ala., and delivered from Gadsden with the exception, that freight for the Dwight



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Manufacturing Company at Alabama City or its employees is taken by the defendant to Alabama City and delivered to said Dwight Manufacturing Company without additional charge; that the receipts of defendant from passengers and freight at Alabama City as detailed above, would not pay the actual operating expenses of defendant's railway within the corporate limits of Alabama City, that no license as required by the ordinances named in the complaint, or either of them, was ever taken out or paid for by defendant; that during the years named in the complaint, Alabama City contained some 2,000 inhabitants. The ordinances of the city were then set out in the agreed statement of facts, and the charter of the defendant specially referred to. The other facts of the case are sufficiently stated in the opinion.

On the submission of the cause, the court rendered judgment in favor of the plaintiff. The defendant appeals, and assigns as error the rulings of the court upon the pleadings and the rendition of judgment for the plaintiff.

Oscar R. Hundley, for appellant.

Dortch & Martin, for appellee.

HARALSON, J. 1. There was no error in overruling the demurrer to the third count of the complaint,—the only one insisted on in argument,—on the ground that it did not set out in full the ordinance alleged to have been violated. It did state the substance of the ordinance, and averred its violation. It was only necessary to state its purpose and date, so as to identify it and aver its violation. *Goldthwaite v. City Council of Montgomery*, 50 Ala. 486.

2. In plea 2, the defendant averred that it had neither an agent nor an office in Alabama City, and had not had, since the enactment of the ordinance referred to in the complaint. The plaintiff moved to strike this averment out of the plea, because it was immaterial and irrelevant to the issue, and frivolous, which motion was granted, and in this there was no error. The fact averred did not negative defendant's liability to pay a license to do business in the municipality. *Railroad Co. v. Tapia*, 94 Ala. 228, 10 South. 236.

The defendant does not insist on errors assigned on ruling of the court sustaining demurrers to pleas 4, 5 and 6.

3. The remaining grounds insisted on are, that the ordinance is void, for that, as alleged, it is violative of interstate commerce laws and of the fourteenth amendment of the federal constitution, in that the revenue derived by the company on business done within the town, did not exceed \$200 per annum, a sum not equal to the expenses incurred in operating the railway within the city, and for that reason, a tax of \$50 for a business license was unreasonable.

The act chartering Alabama City (Acts 1890-91, p. 816), bestows on the mayor and aldermen all the powers usually found in the charters of cities, and among them the power (section 12), "to ordain and pass such ordinances and by-laws,

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not inconsistent with the laws of this state, as shall be needful for the government, police interest, welfare and good order of said city; \* \* \* to have and exercise police power in said city" etc.; and by section 15, "That said city council shall have authority to levy and collect from all persons, firm or corporation trading or carrying on any business, trade, or profession by agent or otherwise in said corporate limits, a license tax, which shall be fixed and declared by ordinance."

Under the agreed statement of facts on which the case was tried, it appears that for each year for which the license tax in this case is claimed, the mayor and aldermen had passed an ordinance making it unlawful for any person, firm or corporation to engage in or carry on any business, trade or profession in said city, for which a license is required by law, without having paid for and taken out a license therefor as required by ordinance. The clause of the ordinance as to railroads was as follows: "Railroads, each company having an office in, or running cars through or into this city for the business of transporting freight or passengers from Alabama City to other points in this state and from other points in the state, to Alabama City, \$50."

The ordinance by its terms invades no provision of interstate commerce regulations. It applies solely to business carried on by railroads, done exclusively within the borders of the state, and if our former adjudications on the subject are to be adhered to, from which he have no reasons to depart, the ordinance does not interfere with interstate commerce. *City of Anniston v. Southern Ry. Co.*, 112 Ala. 557, 20 South. 915; *Holt v. City of Birmingham*, 111 Ala. 369, 19 South. 735.

Our eyes have not been opened to any violation of the fourteenth amendment to the federal constitution, by the ordinance, nor do we regard the privilege tax as imposed, unreasonable and void on that account. "The reasonableness or unreasonableness of a license tax cannot be determined by the extent of the business of a single individual. There may be competition, or negligence on his part, or other considerations affecting the extent of the business." *Nashville, C. & St. L. R. Co. v. City of Attalla*, 118 Ala. 368, 24 South. 450.

We have passed on the questions requiring consideration, and under the agreed state of facts, conclude that the court below did not err in the judgment rendered.

Affirmed.

*HERBICH v. NORTH JERSEY ST. RY. CO.*

*(Court of Errors and Appeals of New Jersey, June 16, 1902.)*

[52 Atl. Rep. 357.]

**Injury to Street Railway Passenger—Child Thrown Down by Starting of Car—Negligence—Instructions.\***

In the case of a plaintiff two years and nine months old, who was

\*See monograph appended to *Freeman v. Metropolitan St. Ry. Co.* (Kan.), 3 R. R. R. 584, 26 Am. & Eng. R. Cas., N. S., 585.

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thrown down by the starting of a street car, which she had boarded, before she had time to be seated, and while she was for the moment out of the reach of her attendant, who was also boarding the car, it is not error for the court to refuse to charge the jury "that the starting of a car before a passenger is seated is not negligence."

Instructions.

When the trial judge has stated to the jury in concrete terms the legal principles applicable to the case, it is not error for him to refuse to charge the abstract principles.

(Syllabus by the Court.)

**Error to supreme court.**

Action by Ida H. Herbich, by her next friend, against the North Jersey Street Railway Company. Verdict for plaintiff was reversed by the supreme court (47 Ala. 427), and plaintiff brings error. Judgment of supreme court reversed, and of circuit court affirmed.

Louis Hood, for plaintiff in error.

J. B. Vredenburg, for defendant in error.

DIXON, J. On the trial of this case in the Essex circuit the evidence on behalf of the plaintiff was to the following effect: On the morning of July 6, 1899, the plaintiff's mother, having in charge the plaintiff, then two years and nine months old, and also carrying an umbrella and two parcels, boarded a summer street car of the defendant company at the corner of Market and Broad streets, in Newark. She first lifted the child into the car, and placed her in the aisle between the two front seats, which faced each other. She then proceeded to get into the car herself, and, before she could reach the child or be seated, the conductor, although he had both mother and child in view, gave the signal, and the car started with a jerk, which threw the child off the further side of the car, resulting in serious injury to her. The defendant's evidence substantially differed from this, in tending to prove that, before the conductor gave the signal, he saw that both mother and child were seated,—the child occupying the end seat,—and that the car made only the usual start. Upon the controversy thus indicated the defendant requested the trial judge to charge the jury that "the starting of a car before a passenger is seated is not negligence," which request the judge refused, and instructed the jury that it was for them to determine whether "the car was started at an improper time; that is, started while the plaintiff was in a position of peril,—before an opportunity had been afforded to the plaintiff and her mother to reach a place of safety." The defendant duly excepted. The plaintiff having obtained a verdict and judgment, the defendant removed the record by writ of error to the supreme court, and there the judgment was reversed because of the refusal and charge above stated. The plaintiff has now, by a similar writ, brought the record to this court.

We regard the court pursued by the trial judge as unexceptional. As applied to the circumstances for which the defendant contended, the proposition that the starting of a car

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before a passenger is seated is not negligence was irrelevant; for, according to that contention, the plaintiff and her mother were both seated before the car started. As applied to the circumstances for which the plaintiff contended, the proposition was untrue, or at least it was for the jury, not the judge, to say whether it was true. While usually the proposition may be accepted as true (*Ayers v. Railway Co.*, 156 N. Y. 104, 50 N. E. 960), yet the passenger may be so infirm, by reason of infancy or old age or sickness or lameness, or other cause, that even the ordinary movement of a street car in starting before he is seated would be likely to throw him down. In such cases, if the carrier is chargeable with notice of the infirmity, it cannot be the duty of the court to instruct the jury that the starting of the car is not a breach of the carrier's obligation to exercise a high degree of care for the safety of the passenger. In the present case the infirmity of the plaintiff was evident, and must have been observed by the conductor, who, according to his own testimony, had the mother and child in view from the time when they began to board the car until the accident happened.

We have examined the other exceptions taken at the trial, and find none worthy of special mention. The case was plainly one for the jury, and the numerous requests to charge, so far as they were not complied with, were either unsound or irrelevant, or were so general as to be more likely to perplex than to assist the jury in the discharge of their functions. The legal rules applicable to the case were clearly set forth by the judge in concrete terms, and nothing further could properly be demanded.

The judgment of the supreme court is reversed, and that of the circuit is affirmed. Let the record be remitted to the circuit court.

*KELLY v. VICKSBURG, S. & P. Ry. Co.*

*(Supreme Court of Louisiana, May 12, 1902.)*

[32 So. Rep. 388.]

**Carriers—Injury to Passenger.\***

A local freight train, with a caboose car attached, was in the habit of carrying passengers. As it drew up at a station, plaintiff, without delay, boarded the caboose at the rear end, it being the last car of the train. Just as he gained the door, and before he could enter, the train started with a violent jerk, throwing him backwards off the platform, and severely injuring him: held actionable negligence on part of defendant. Sufficient time to board the car and reach a place of safety inside the caboose was not given him before the train was started and the violent lurching of the cars came.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Ouachita;  
Luther Egbert Hall, Judge.

\*See monograph attached to *Freeman v. Metropolitan St. Ry. Co.* (Kan.), 3 R. R. R. 584, 26 Am. & Eng. R. Cas., N. S., 584.

Kelly v. Vicksburg, S. & P. Ry. Co

Action by J. B. Kelly against the Vicksburg, Shreveport & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Stubbs & Russell, for appellant.

Andrew Augustus Gunby, for appellee.

BLANCHARD, J. This is an action sounding in damages for personal injuries alleged to have been sustained by plaintiff through the negligence of the servants of defendant corporation. The amount sued for is \$2,500. The defense is a denial of the negligence charged, and the averment that plaintiff came to harm through his own negligence. The case was tried without the aid of a jury, and from a decree entered up by the district judge in favor of plaintiff for \$750, defendant prosecutes this appeal. Answering the appeal plaintiff prays an amendment of the judgment by increasing the same to the amount demanded in his petition.

Ruling—We agree with the trial judge that the plaintiff has made out his case. The conflict of testimony characteristic of damage suits is observable here; but the weight of evidence sustains the plaintiff. On the afternoon of the 14th of June, 1901, plaintiff arrived at the depot of defendant company at Calhoun, a station some 16 miles west of the Ouachita river. The east-bound local freight train was due at Calhoun at 4 o'clock p. m. This train had a caboose attached and made a practice of carrying passengers. Plaintiff had gone to the depot to take this train. He purchased a ticket from the station agent, and awaited the train. It was nearly an hour late that day, reaching Calhoun a little before 5 o'clock. One or more of the passengers on this train were anxious to catch the south-bound passenger train at the city of Monroe on the Ouachita river, and if the movements of the freight train were expedited and some of the lost time made up between Calhoun and Monroe, this could be done, otherwise not. Under the circumstances it is evident no time was to be wasted at Calhoun. Something of a hurry was on. The train, composed of some 25 or 30 cars, drew up at the station, the rear car, which as the caboose, halting some 20 or 30 feet east of the depot platform. Plaintiff and J. H. Young, strangers to one another, stood on the platform of the depot and as the train slowed down, left the platform to board it. They walked rapidly towards the rear end of the caboose, the conductor calling out "All aboard" as they did so. Just as the caboose stopped, Young, who was ahead, ascended the steps, crossed the rear platform of the caboose to the door, and had just entered the doorway, when the plaintiff, closely following him, and about, himself, to turn in at the door, was, by a sudden and violent jerk of the car, thrown backward off the platform to the ground, sustaining serious and painful injuries. While there was an iron railing or protection guard at the rear of the platform, it did not extend across its entire length.



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There was the usual break at the center, intended, when not used as a passageway, to be spanned by a chain. But the chain was not up at the time in question, and through this open space plaintiff was precipitated to the ground. Sufficient time to board the car and reach a place of safety inside the caboose was not given the plaintiff before the train was started and the violent lurching of the car came. This was actionable negligence and defendant must answer for the damages occasioned.

The issue is one of fact, and we give conclusions merely, believing that a lengthy discussion of the testimony would serve no useful purpose. With regard to the quantum of damages, the sum allowed by the trial judge is deemed insufficient. Plaintiff is "left-handed." It was his left arm that was injured by the fall. The nature of the injury is thus described by the company's surgeon who attended him: "Dislocation of both bones of the forearm and the humerus of the upper bone of the arm; one bone in front and the other behind the humerus." Asked how far did the two small bones of the lower arm pass above the elbow, he answered: "That is hard to say. The bones were so you could pull them up or down, whichever way you tried." He was put under the influence of chloroform, the arm operated on and then incased in plaster of paris. The doctor states it was rather an unusual injury. Plaintiff says the injury was at the elbow and the bones could be pulled backward and forward; that he suffered intense pain—far greater than he had ever before experienced. He is a young man 23 years of age, unmarried, but supports an aged mother. It is shown he is industrious, had worked for years at a large sawmill at an occupation which required the full use of the arm that was injured. He earned \$40 a month, but since the accident has not been able to continue at that work. Has had to engage in lighter labor at smaller remuneration. He lost considerable time in consequence of his injuries. Says the joint of the elbow which sustained the injury is abnormally large; that his arm has never fully recovered. Twelve hundred and fifty dollars, or an increase of \$500 over the sum allowed, is none too large for injury and damage of this character.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be increased to \$1,250, with legal interest from judicial demand, and as thus amended the same is affirmed at the cost of defendant in both courts.

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CENTRAL STOCK YARDS CO. v. LOUISVILLE & N. R. CO.

(*Circuit Court of Appeals, Sixth Circuit, July 8, 1902.*)

[118 Fed. Rep. 113.]

**Carriers of Live Stock—Delivery—Stock Yards.**

Where a railroad company has, by building stock yards, or by contract with a stock yards company, made adequate provision for

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the discharge of its duty as a common carrier with respect to live stock shipped over its line to a city, it is not required by the common law to make delivery of stock consigned to such city to connecting roads for delivery at other stock yards therein.

**Same—Discrimination—Interstate Commerce Act.**

It is the duty of a carrier of live stock to provide reasonable facilities for the unloading and care of such stock; and where it has done so, either by building stock yards of its own or by contract with a stock yards company, its refusal to deliver stock to other stock yards in the same city is not an unlawful discrimination, in violation of section 3 of the interstate commerce act (24 Stat. 380).

**Same—Connecting Railroads—Interchange of Traffic.**

In the absence of statutory provision, the interchange of traffic between two connecting railroads is a matter for contract between them, and the courts have no power to compel such interchange, or to fix the terms on which it shall be made. Nor is such power conferred upon the courts by the interstate commerce act.

**Same—Interstate Commerce—State Regulation.**

A state is without power to compel a railroad company to transfer cars of live stock to a connecting road at a point of connection within the state, where the shipment was received in another state, and is, therefore, a subject of interstate commerce.

**Appeal from the Circuit Court of the United States for the Western District of Kentucky.**

This is a bill filed by the stock yards company against the railroad company seeking a mandatory injunction requiring the railroad company to receive, transfer, transport, and deliver shipments of live stock tendered to it outside the state of Kentucky, consigned or tendered to be consigned to any points of physical connection between its line and the line of the Southern Railway Company in Kentucky, and designated for the Central Stock Yards or its station in Kentucky; and in like manner to deliver, transport, and transfer such consignment to any person to whom it may be billed at said stock yards; and, further, to recognize the right of the consignor and the consignee to change at any of the stations of the said company the destination of said shipment, so as to make delivery in the manner agreed upon at a point of physical connection between the lines of the Southern Railway Company and the Louisville & Nashville Railroad Company for delivery to said Central Stock Yards; also seeking a temporary injunction and damages in the sum of \$3,000. The Central Stock Yards Company is a duly organized corporation authorized to conduct a general business in the state of Kentucky. The Louisville & Nashville Railroad operates in the states of Kentucky, Tennessee, Alabama, Georgia, Mississippi, Louisiana, Florida, Indiana, and Illinois as a common carrier. The Central Stock Yards Company has located its plant just outside the city of Louisville, where it has facilities for receiving, unloading, feeding, and caring for live stock. This plant is about nine miles from the terminus of the Southern Railroad in the city of Louisville. It is further alleged that the Southern Railway Company has established a station, known as the "Central Stock Yards," at or near the location of the plant.

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The defendant company refused to receive stock from points outside the state of Kentucky billed to the Central Stock Yards Company, or to any person in its care, asserted the right to deliver all live stock designated for Louisville passing over its own lines at the Bourbon Stock Yards, shown on the map at H, with which company the defendant has a contract,—the Louisville & Nashville Railroad Company agreeing that it would not lease, rent, or sell within the city of Louisville for the establishment of any other stock yards, or establish any other stock yards within or adjacent to said city; that it will deliver, and cause to be delivered, so far as it legally may, all live stock shipped over the lines of the defendant company consigned to the city of Louisville, and will load all stock for other persons at said city at said yards; providing that, if the terms of such agreement should be invalidated by any judgment or order of the court, or by legislative requirement, then the stock yards company should have no claims for damages against the railroad company arising out of the terms of the contract. The Central Stock Yards Company is a corporation, and was established by an agreement with the Southern Railway Company, making it the stock yards of that company in Louisville and vicinity. It is claimed that the complainant has a right to compel the shipment of live stock and transfer of cars consigned to the Central Stock Yards Company at one of the points of physical connection with the Southern Railway upon three grounds: (1) That such is the legal duty of the defendant company as a common carrier. (2) Because of the requirements of the act to regulate commerce, passed by the congress of the United States on February 4, 1887, known as the "Interstate Commerce Act." (3) By amended bill, that such is the duty of the corporation under the constitution and laws of the state of Kentucky. The circuit court dismissed the application for a temporary injunction, and afterwards dismissed the bill for want of jurisdiction in equity. Complainant appeals.

J. C. Dodd and W. M. Smith, for appellant.

Helm Bruce and Ed. Baxter, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge (after stating the facts as above). The discussion in this case has taken a wide range. In our opinion, it may be disposed in the solution of a few leading propositions, the first being: Is there a right, independent of a statute, to require the railroad company to receive the live stock for shipment to the Central Stock Yards, and to deliver the cars at a point of connection with the Southern Railroad in Louisville for transportation thereto? It is apparent from a consideration of the testimony that the Central Stock Yards Company is primarily the stock yards of the Southern Railway Company. It is true the location is just beyond the city limits, but the business to be transacted is

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the Louisville business in the sale and forwarding of stock in these yards. The contract through which the Central Stock Yards originated is in the record, and there we find an agreement between the Southern Railway Company and the Central Stock Yards Company in which is recited the desire of the railroad company to establish a general stock depot "for the receiving and delivery of stock at Louisville, Kentucky." After stipulations as to the reception and care of the stock, it is further provided that the railroad company will establish the premises of the stock yards company as its stock depot for the purpose of handling like stock to and from Louisville, and agrees not to sell, lease, or use, or license to be used, any part of its ground in or adjacent to Louisville for the establishment of any other stock yards, or otherwise facilitate the establishment of any other stock yards in the city, and will establish no other stock yards depot at or near said city. The railroad company further agrees to establish Louisville rates to and from the premises of the said company on certain lines. It is apparent from these stipulations of the contract that the parties understood that the Central Stock Yards was intended to be, as in fact it is, a Louisville stock yards, to be used, as is recited in the contract, in building up the live-stock business to and from Louisville. We have no question that the Central Stock Yard is as distinctly a yard for the transaction of the business of receiving, keeping, and selling of stock at Louisville as is the Bourbon Stock Yards, established for the same purpose by contract with the defendant company. The question on this branch of the case is thus narrowed to the consideration of the rights of the complainant to require of the Louisville & Nashville Railroad Company shipments and transfers to the Central Stock Yards Company, over the connection with the Southern Railroad, of live stock whose destination is Louisville. The peculiar duties of a common carrier of live stock are pointed out by Mr. Justice Field in *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. Ed. 287. The animals cannot be turned loose, or left without food or shelter in cars standing on the railroad tracks or sidings. They must be placed in suitable quarters, where they can be fed and cared for under the charge of competent agents. The nature of the property requires these services, essential to the discharge of the duty of the carrier in the safe transportation and delivery of live stock. For this purpose it is the duty of the carrier to make provision by suitable yards and proper equipment and competent persons to manage and control the care and delivery of the live stock. We perceive no reason why this duty cannot be discharged by contract with proper persons or companies who shall undertake the same under the responsibility of the carrier. Such a contract was enforced in *Railroad Co. v. Struble*, 109 U. S. 381, 3 Sup. Ct. 270, 27 L. Ed. 970. Justice Harlan observed in *Stock Yards Co. v. Keith*, 139 U. S. 128-136, 11 Sup. Ct. 461, 464, 35 L. Ed. 73:

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**"It did not concern them [the complainants] whether the railroad company duly maintain stock yards or employed another company or corporation to supply the facilities for receiving and delivering live stock it was under the obligation to the public to provide."**

There is no showing of the inadequacy of the Bourbon Stock Yards Company in the matter of accommodations for receiving and caring for cattle. The defendant has there made provisions ample for the care of such stock with a company obligated to discharge the duties in this behalf required by the law of common carriers. Is the defendant obliged by law to make Louisville delivery at other points by making connections for other Louisville stock yards? We think this question must be answered in the negative. To all intents it was so answered by this court in *Butchers' & Drovers' Stock Yards Co. v. Louisville & N. R. Co.*, 14 C. C. A. 290, 67 Fed. 35. In that case the railroad company had entered into a contract with the Union Stock Yards Company, which made it the stock yards depot of the Louisville & Nashville Railroad Company at Nashville. A spur track had been run down Front street, in Nashville, for the accommodation of freight shippers not handling live stock. About 40 feet from this track the Butchers' & Drovers' Company established an independent stock yards. The Butchers' & Drovers' Company sought a mandatory injunction to compel the railroad company to build or allow to be built a side track connecting the spur track with the complainant's stock yards, there to deliver and receive cattle consigned or shipped by the complainant. The obtaining of the right of way and the expense of building the side track were not required of the defendant company, and are not elements essential to the disposition of the case in the opinion rendered by Judge Taft. The contention of the railroad company that, having established a live-stock depot in Nashville, for the reception and delivery of stock in that city, it could not be compelled to receive and deliver from another depot in the city, was sustained. Judge Taft quotes from the opinion of Judge Harlan in *Stock Yards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. Ed. 73, as follows:

**"We must not be understood as holding that the railroad company in this case was under any legal obligation to furnish, or cause to be furnished, suitable and convenient appliances for receiving and delivering live stock at every point on its line in the city of Covington where persons engaged in buying, selling, or shipping live stock choose to establish yards. In respect to the mere loading and unloading of live stock, it is only required, by the nature of its employment, to furnish such facilities as are reasonably sufficient for the business at that city. So far as the record discloses, the yards maintained by the appellant are, for the purposes just stated, equal to all the needs, at that city, of shippers and consignors**



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of live stock; and, if the appellee had been permitted to use them without extra charge for mere 'yardage,' they would have been without just grounds of complaint in that regard, for it did not concern them whether the railroad company itself maintained stock yards, or employed another company or corporation to supply the facilities for receiving and delivering live stock it was under obligation to the public to furnish. But, as the appellant did not accord to appellees the privileges they were entitled to from its principal, the carrier, and as the carrier did not offer to establish a stock yard of its own for shippers and consignees, the court below did not err in requiring the railroad company and the receivers to receive and to deliver live stock from and to the appellees at their stock yards in the immediate vicinity of the appellant's yards, when the former were put in proper condition to be used for that purpose, under such reasonable regulations as the railroad company might establish. It was not within the power of the railroad company, by such agreement as that of November 19, 1881, or by agreement in any form, to burden the appellees with charges for services it was bound to render without any other compensation than the customary charges for transportation."

We think this language is no less applicable to the case under consideration. The Louisville & Nashville Railroad Company has by contract arranged for the discharge of its duties to shippers of live stock at the Bourbon Stock Yards. The proof does not show that these accommodations are inadequate, or the charges illegal. It would doubtless be convenient, and promote the business of dealers and shippers, if other facilities were afforded; but we find in the law nothing aside from a positive statute that requires more ample provision at the hands of the respondent.

It is further alleged in the bill that the refusal to make the desired shipping and transfer of stock to the yards of the complainant is a violation of section 3 of the interstate commerce act, which provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give undue or unreasonable preference or advantage to any particular person, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their respective lines, and those connecting therewith, and shall not discriminate in their rates and charges between such

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connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The claim is that, having granted certain rights and privileges to the Bourbon Stock Yards Company, this section guaranties equal privileges to the Central Stock Yards Company. This construction of the act is not sustainable. It is the duty of the railroad company to provide reasonable facilities for the unloading and care of live stock. This duty it might discharge by itself furnishing sufficient facilities, or it might contract with others to make such provision. The respondent has chosen the latter course. By contract with the Bourbon Stock Yards Company it has provided facilities for the care of stock received at Louisville. These facilities cannot be denied to some and afforded to others. But this is far from saying that it was the purpose of the law to dictate to common carriers the means by which it shall discharge its obligations to shippers. To hold otherwise would be, having regard to the present case, to require the railroad company to make connections with as many stock yards companies as may see fit to provide facilities equal to those furnished by the company or its agents. This would be carrying the act far beyond its terms and purposes. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (C. C.) 37 Fed. 621, 2 L. R. A. 289.

These considerations dispose of this branch of the case. If it could be regarded as one involving the right to require one railroad to interchange traffic with another, the position of the complainant would be equally untenable. At common law a railroad company is only bound to transport freight to its own terminus. The rule is thus stated in *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291:

"At common law a carrier is not bound to carry except on his own line, and we think it quite clear that, if he contracts to go beyond, he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of his contract; and if he holds himself out as a carrier beyond his line, so that he may be required to carry for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the help of others, than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associate for doing his own work."

It is averred in the bill that the Southern Railway Company has notified the respondent that it would be, and now is, willing to be responsible from points of physical connec-

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tion with the Louisville & Nashville Railroad for the delivery of such live stock and the collection of all charges on the same, and would promptly return to such points of connection all empty cars, and would account for all freight charges collected in the usual way. This may be true, and would possibly be a reasonable arrangement. But have the courts the right, in the absence of statute, to dictate to carriers the contracts they shall make in the interchange of traffic, and to require such to be carried out as the courts deem reasonable? The billing and transfer of freight from outside points over the two railroads is a matter of arrangement between them. The proportion of the joint tariff each shall receive, the handling of cars, the liability of one to the other, and other matters, are to be determined by the contract between the parties. Each controls its own railroad, and may determine for itself upon what terms it will unite in a joint tariff. No arrangement exists with the Southern Railroad for the transportation and delivery of cars of live stock to the Central Stock Yards, if that can be assumed to be a station on the line of the Southern Railroad; nor do we think a court of equity has the power to make one, and supervise its execution; nor has this right been conferred upon the courts by the interstate commerce act. This doctrine is so thoroughly established as to require no more than the citation of the authorities in support of it. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291; *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791; *Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499; *Northern Pac. R. Co. v. Dustin*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1092; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co. (C. C.)* 37 Fed. 567, 2 L. R. A. 289; *Little Rock & M. R. Co. v. St. Louis, I. & M. Ry. Co. (C. C.)* 41 Fed. 559; *Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co. (C. C.)* 51 Fed. 475; *St. Louis Drayage Co. v. Louisville & N. R. Co. (C. C.)* 65 Fed. 39; *Allen & Lewis v. Oregon R. & Nav. Co. (C. C.)* 98 Fed. 16.

It is further alleged that the duty of complying with the complainant's demand rests upon the defendant company because of the requirements of the constitution of the state of Kentucky and the laws passed in pursuance thereof. Assuming, without deciding, that the Kentucky constitution and legislation require the defendant company to receive, deliver, transport, and transfer freight to any point that is in physical connection with the tracks of another company, so that the complainant has, as to traffic originating in Kentucky, the right to require that the shipment be received and transported in accordance with the prayer of the bill, the question remains, have the Kentucky constitution and statutes any operations beyond the limits of that state? The interstate commerce clause of the federal constitution has given rise to

much litigation and frequent construction by the supreme court. It is thoroughly settled that the power of congress to regulate commerce is plenary, and no state has the right to regulate purely interstate commerce. On the other hand, the state has the right to make provisions as to matters within its own boundaries intended as aids to commerce, not thereby regulating interstate traffic. Without undertaking to reconcile or consider the numerous decisions, we may refer to *Mobile Co. v. Kimball*, 102 U. S. 691, 26 L. Ed. 238. Mr. Justice Field, with his usual clearness, has called attention to the sound rules of construction to determine what is and what is not within the power of a state:

"Perhaps some of the divergence of views upon this question among former judges may have arisen from not always bearing in mind the distinction between commerce, as strictly defined, and its local aids or instruments or measures taken for its improvement. Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce, as thus defined, there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adapt such a system. Action upon it by separate states is not, therefore, permissible." Page 702, 102 U. S., 26 L. Ed. 238.

It is within the power of a state to require connecting tracks between two railroad companies at an intersection for the transfer of cars used in the local business of such lines of railroad. This may have been necessary for the accommodation of state commerce. *Railroad Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194. So it is competent for a state to require a railroad company to stop a certain number of trains each day at stations having a certain number of inhabitants, within the state. Such regulations do not interfere with the delivery or transportation of passengers traveling between states in such wise as to be regulations affecting interstate traffic. The statute simply amounted to requiring three trains of the company to stop at the station named each day. *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702. Likewise a state may require a telegraph company to deliver a message. *Telegraph Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105. But it is thoroughly well settled that a state may not regulate interstate commerce, using the terms in the sense of intercourse and the interchange of traffic between the states. In the case at bar we think the relief sought pertains to the transportation and delivery of interstate freight. It is not the means of making a physical connection with other railroads that is aimed at, but it is sought to compel the cars and freight received from one state to be delivered to another at a par-

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ticular place and in a particular way. If the Kentucky constitution could be given any such construction, it would follow it could regulate interstate commerce. This it cannot do.

We reach the conclusion that no case was made justifying the relief prayed for, and that there was no error committed in dismissing the bill. Judgment affirmed.

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WALLACE *et al.* v. ARKANSAS CENT. R. CO.

(Circuit Court of Appeals, Eighth Circuit, October 27, 1902.)

[118 Fed. Rep. 422.]

**Carriers—Tariff Schedule Fixed by State Commission—Constitutionality.**

A railroad company is entitled to an injunction restraining a state railroad commission from putting in force a proposed tariff schedule where the bill alleges that the rates established by such schedule will amount to a taking of complainant's property without due process of law, by reducing its earnings far below the amount required to pay its operating expenses, taxes, and fixed charges, and the cause is submitted for final decision on demurrer to other paragraphs of the bill, and without any denial of such allegation.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

George W. Murphy, Atty. Gen., for the State.

Oscar L. Miles (George E. Dodge and B. S. Johnson, on the brief), for appellee.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. The record in this case discloses that the Arkansas Central Railroad Company, the appellee, filed a bill against Jeremiah G. Wallace, Felix M. Hanley, and Henry W. Wells, composing the board of railroad commissioners of the state of Arkansas, whereby it prayed for an injunction restraining said board of railroad commissioners from putting in force a certain freight tariff applicable to certain railroads in the state of Arkansas, which, by an order of the board, had been adopted and made effective as of August 2, 1900, and declared to supersede all other tariffs then in effect on said railroads. Besides asking for an injunction restraining the commission from putting this tariff in force, the railroad company also asked for an injunction restraining the commissioners from instituting any suits against the complainant for the recovery of any penalties under the laws of the state by virtue of the fact that the complainant had not adopted and made such rates effective on its road as it was ordered to do. At a later date the term of office of Henry W. Wells, one of the commissioners, having expired, and Abner Gaines having been elected in his place, he was substituted as one of the defendants in place of Wells.



On the presentation of the bill of complaint to the honorable Jacob Trieber, United States district judge for the Eastern district of Arkansas, a temporary restraining order, such as was asked, was granted at chambers on August 2, 1900. At a later date, to wit, on August 14, 1900, the complainant company obtained leave to file an amended or substituted bill of complaint, which was thereupon filed. It will suffice to say, of the original and substituted bills, that by the fifth and tenth paragraphs thereof it was charged, in substance, that the effect of the freight tariff which had been put in force by the order of the commission was to establish a joint through rate as between the complainant and connecting carriers, and it was averred that by the laws of the state of Arkansas, under which the commission acted, no power or authority was given to it to establish a joint through tariff as between the complainant company and other railroads upon freight which was carried wholly within the state, and that the tariff which the commission had attempted to put in force was void and illegal for that reason. In another paragraph of the original and substituted bills, being paragraph 7, the complainant alleged that the schedule of rates which had been put in force by the commission as of August 2, 1900, and concerning which complaint was made as above,—because it established a joint through rate,—would, if put in force, reduce the revenues of the complainant to the extent of 33½ per cent. below its present revenue, and would amount to a confiscation of the complainant's railroad property, and have the effect, if put in force, of taking the complainant's property for public use without just compensation, in violation of the provisions of the constitution of the United States.

The defendants below, who are the appellants in this court, filed an answer to the original and substituted bills on February 2, 1901; but subsequently, on April 25, 1901, they appeared by their solicitor, and by leave of court withdrew the aforesaid answer, and filed a demurrer to paragraphs 5 and 10 of the complaint, which, as before stated, averred, in substance, that the laws of the state of Arkansas did not vest in the commission the power to establish joint rates between connecting carriers, such as the commission had attempted to establish. On the hearing of the demurrer to the fifth and tenth paragraphs of the bill the same was overruled. The defendants thereupon declined to plead further, and an order was subsequently entered making the temporary injunction perpetual, and adjudging that the complainant recover its costs and have execution therefor. In other words, a final decree was entered in favor of the complainant below. The case comes to this court on appeal from the last-mentioned decree.

It is obvious, we think, that no relief can be afforded to the appellants in this court, whether the action of the lower court upon the demurrer to the fifth and tenth paragraphs of the

*Cote v. New York, N. H. & H. R. Co*

bill was erroneous or otherwise. Both the original and substituted bills contained a specific allegation that the tariff schedule which had been put in force by the commission, and made effective as of August 2, 1900, would reduce the complainant's earnings to such an extent as would amount to a taking of its property for public use without just compensation. It was averred in that paragraph of the bill that such would be the effect of the proposed schedule, because the income which the complainant was at the time deriving from all sources, by the use of its property, was not sufficient, under the existing schedule of rates, to enable the company to pay its operating expenses, taxes, and fixed charges, and that the proposed schedule of rates would yield far less than the existing schedule. In view of the action taken by the defendants when their demurrer to the fifth and tenth paragraphs of the bill was overruled, these allegations stood confessed; and, such being the case, the decree of the lower court was clearly right under repeated decisions of the supreme court of the United States holding that a state law or regulation establishing rates for the transportation of persons or property, such as will not admit of the carrier earning such a compensation as under all the circumstances of the case is just to it and the public, operates to deprive the company of its property without due process of law, and to deny to it the equal protection of the law, in violation of the fourteenth amendment to the federal constitution. *Smyth v. Ames*, 169 U. S. 466, 522, 523, 18 Sup. Ct. 418, 42 L. Ed. 819; *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014. It may be that the failure of the defendants below to deny the allegations contained in the seventh paragraph of the bill was due to an oversight, but if such was the fact the mistake cannot be remedied in this court.

Upon the face of the record and the admitted facts, the decree below was clearly right, and it should be affirmed. It is so ordered.

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*COTE v. NEW YORK, N. H. & H. R. Co.*

*(Supreme Judicial Court of Massachusetts, Bristol, Nov. 25, 1902.)*

[65 N. E. Rep. 400.]

**Carriers—Injury to Freight—Transportation over Various Lines—Presumption.\***

Where freight transported over various lines of railway is injured, it is to be presumed, in the absence of evidence, that the injury occurred on the last line.

Appeal from superior court, Bristol county; Henry K. Braley, Judge.

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\*See generally, foot-note appended to *Missouri K. & T. Ry. Co. v. Mazzie* (Tex. Civ. App.), 2 R. R. R. 950, 25 Am. & Eng. R. Cas., N. S., 950.

## Georgia Southern &amp; F. Ry. Co. v. Cartledge

Action by Louis O. Cote against the New York, New Haven & Hartford Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. Auger, for plaintiff.

F. S. Hall, for defendant.

HOLMES, C. J. This is an action for damage to freight delivered by the plaintiff to the Boston & Maine Railroad at Lawrence to be carried to New Bedford, and delivered by that road to the defendant for the latter to complete the transportation. The freight was in a sealed car, and it does not appear by which road the damage was done. The case was submitted to the Superior Court on agreed facts with power to draw inferences, and that court ordered judgment for the plaintiff. The defendant appealed rather in the hope that this court might discover some distinction between freight and passenger's baggage than on any articulate reason for supposing one to exist. We have failed to make the discovery. As was pointed out in *Moore v. Railroad Co.*, 173 Mass. 335, 337, 53 N. E. 816, 73 Am. St. Rep. 298, the so-called presumption that the harm was done on the last road, although started as a presumption of fact, has been fortified if not maintained on grounds of convenience. These grounds apply equally to freight.

Judgment for plaintiff.

## GEORGIA SOUTHERN &amp; F. RY. CO. v. CARTLEDGE.

(*Supreme Court of Georgia, Aug. 7, 1902.*)

[42 S. E. Rep. 405.]

## Injury to Passenger—Subsequent Precautions as Admissions of Negligence.\*

That, after an occurrence resulting in injury to one person, another who is sought to be held accountable therefor took additional precautions to prevent others from being likewise injured, can neither justly nor logically be regarded as an admission on his part that he was negligent in not sooner observing such precautions. Prior decisions by this court virtually to the contrary reviewed and overruled.

## Same—Contributory Negligence.

It affirmatively appearing from the evidence in the present case that the proximate cause of the plaintiff's injury was his own independent act, for which there was no necessity, and which was in no way brought about by any default on the part of the defendant company, he was not entitled to recover.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.  
Action by L. J. Cartledge against the Georgia Southern &

\*See note appended to *Louisville & N. R. Co. v. Henry* (Ky.), 11 Am. & Eng. R. Cas., N. S., 405; *Bush v. Delaware, L. & W. R. Co.* (N. Y.), 21 Am. & Eng. R. Cas., N. S., 516; *Young v. Great Northern Ry. Co.* (N. Dak.), 14 Am. & Eng. R. Cas., N. S., 72; *Fisher v. Paxson* (Pa.), 8 Am. & Eng. R. Cas., N. S., 516; *Louisville & N. R. Co. v. Bowen* (Ky.), 9 Am. & Eng. R. Cas., N. S., 276.

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Florida Railway Company. From a judgment for plaintiff, defendant brings error. Reversed.

Hall & Wimberly and R. C. Jordan, for plaintiff in error.  
Guerry & Hall and M. F. Hatcher, for defendant in error.

LUMPKIN, P. J. This was a suit for damages against the railway company by Cartledge, who set forth in his petition the following allegations of fact: "On the 30th day of June, 1900, he was in the employment of the United States government in the railway mail service, and was, in the course of his employment, on said day riding upon the train and in a car of the said company." On that day, "while on the railroad train of said company in the discharge of his duties as mail clerk on his car furnished by said road, \* \* \* the mail grab, which was fastened on the outside of said car, came in contact with a post standing upon the platform of said railway company at the station house at Sofkee." The result was that the "mail grab was turned from its fastenings to the side of said car and thrown down and upon the left hand of petitioner, who was at that time inside the car, where he had the right and where it was his duty to be, and where he then was in the exercise of all the care incumbent upon him. \* \* \* Petitioner's hand was terribly mutilated, wounded, and crushed; the bone in the first finger of said hand being broken [and] made permanently useless." The injury thus sustained by him "was caused by the negligence of said railroad company in erecting the said post too near the track of said railroad company, and allowing it to remain there." A recovery was had by the plaintiff in the court below, and the company is here complaining of a judgment denying it a new trial.

1. At the time of the plaintiff's injury the post above referred to "stood thirteen or fourteen inches from the side of the passing coach. The plaintiff was permitted to testify, over the objection of the defendant, that this post had been moved further back since the accident"; the objection urged against the admission of this testimony being that it was not "competent evidence for the purpose of showing negligence on the part of the defendant." Tested by rulings heretofore made by this court, this testimony was clearly admissible. In *Railroad Co. v. Renz*, 55 Ga. 126, it was held that, "Upon the trial of a suit against a street railroad company for an injury sustained by careless driving over a sharp curve and sudden elevation, it was competent to show that the defendant had altered the curve since the accident." A similar ruling was announced in *Central R. R. v. Gleason*, 69 Ga. 201. In *Railway Co. v. Flannagan*, 82 Ga. 580, 9 S. E. 471, 14 Am. St. Rep. 183, the question arose whether or not it was competent for the plaintiff to prove that after the homicide of her husband, who was run over and killed by an engine belonging to the defendant, "the engines of the company were run more

slowly along the street which was the scene of the accident." Commenting upon the relevancy of evidence which had been introduced to establish that such was the fact, Chief Justice Bleckley, who delivered the opinion of the court, said (page 589, 82 Ga., page 472, 9 S. E., 14 Am. St. Rep. 183), "There is much authority to the contrary, \* \* \* but we think consistency with our own decisions requires us to hold that it was admissible." Doubtless influenced by the intimation thus thrown out that the question presented, were it an open one, would admit of some doubt, counsel for the plaintiff in error in the present case asked and were granted leave to review these decisions. We have accordingly given them careful consideration, with the result that we are constrained to announce, after mature deliberation, that our faith in their correctness, which in the past had already been much shaken, has succumbed to the conviction that they cannot be defended either upon principle or by the weight of authority. We find upon investigation that they are not in accord with the rule which obtains in England. See *Hart v. Railway Co.*, 21 Law T. Rep. (N. S.) 261. Nor are they in harmony with the consensus of judicial opinion which prevails in this country. See *Railroad Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405, and cases cited on page 207, 144 U. S., page 593, 12 Sup. Ct., 36 L. Ed. 405; *Railroad Co. v. Parker*, 5 C. C. A. 220, 55 Fed. 595; *Paving Co. v. Odasz*, 8 C. C. A. 471, 60 Fed. 71; *Motey v. Marble Co.*, 20 C. C. A. 366, 74 Fed. 156; *Southern Pac. Co. v. Hall*, 41 C. C. A. 50, 100 Fed. 761; *Railroad Co. v. Malone*, 109 Ala. 510, 20 South. 33; *Sappenfield v. Railroad Co.*, 91 Cal. 49, 27 Pac. 590; *Hager v. Southern Pac. Co.*, 98 Cal. 309, 33 Pac. 119; *Limberg v. Glenwood Lumber Co.*, 127 Cal. 598, 60 Pac. 176, 49 L. R. A. 33; *Nally v. Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47; *Harvey v. Mining Co. (Idaho)* 31 Pac. 819; *Holt v. Railway Co. (Idaho)* 35 Pac. 39; *Giffen v. City of Lewiston (Idaho)* 55 Pac. 545; *City of Bloomington v. Legg*, 151 Ill. 10, 37 N. E. 696, 42 Am. St. Rep. 216; *Howe v. Medaris*, 183 Ill. 288, 55 N. E. 724; *Railroad Co. v. Clem*, 123 Ind. 16, 23 N. E. 965, 7 L. R. A. 588, 18 Am. St. Rep. 303; *Board v. Pearson*, 129 Ind. 456, 28 N. E. 1120; *Railroad Co. v. Lee*, 17 Ind. App. 216, 46 N. E. 543; *Cramer v. City of Burlington*, 45 Iowa, 627; *Hudson v. Railroad Co.*, 59 Iowa, 581, 13 N. W. 735, 44 Am. Rep. 692; *Beard v. Guild*, 107 Iowa, 476, 78 N. W. 201; *Oil Co. v. Tierney*, 92 Ky. 368, 17 S. W. 1025, 14 L. R. A. 677, 36 Am. St. Rep. 595; *Downey v. Sawyer*, 157 Mass. 418, 32 N. E. 654; *Dacey v. Railroad Co.*, 168 Mass. 479, 47 N. E. 418; *Turnpike Co. v. Case*, 80 Md. 36, 30 Atl. 571; *Thompson v. Railway Co.*, 91 Mich. 256, 51 N. W. 995; *Hammargren v. City of St. Paul*, 67 Minn. 6, 69 N. W. 470; *Ely v. Railway Co.*, 77 Mo. 34; *Hipsley v. Railroad Co.*, 88 Mo. 348, 27 Am. & Eng. R. Cas. 287; *Alcorn v. Railroad Co.*, 108 Mo. 81, 18 S. W. 188, 53 Am. &



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Eng. R. Cas. 87; *Corcoran v. Village of Peekskill*, 108 N. Y. 151, 15 N. E. 309; *Getty v. Town of Hamlin*, 127 N. Y. 636, 27 N. E. 399; *Clapper v. Town of Waterford*, 131 N. Y. 382, 390, 30 N. E. 240; *Lowe v. Elliott*, 109 N. C. 581, 14 S. E. 51; *Skottowe v. Railway Co.*, 22 Or. 430, 30 Pac. 222, 51 Am. & Eng. R. Cas. 444, 16 L. R. A. 593; *Farley v. Veneer Co.*, 51 S. C. 222, 241, 28 S. E. 193; *Railroad Co. v. Wyatt*, 104 Tenn. 432, 58 S. W. 308, 78 Am. St. Rep. 926; *Railway Co. v. McGowan*, 73 Tex. 356, 11 S. W. 336; *Railway Co. v. Hennessey*, 75 Tex. 155, 12 S. W. 608; *Fordyce v. Chancey*, 2 Tex. Civ. App. 24, 21 S. W. 181; *Bell v. Shingle Co.*, 8 Wash. 27, 35 Pac. 405; *Carter v. City of Seattle*, 21 Wash. 585, 59 Pac. 500; *Anderson v. Railway Co.*, 87 Wis. 195, 58 N. W. 79, 23 L. R. A. 203; *Jennings v. Town of Albion*, 90 Wis. 22, 62 N. W. 926; *Green v. Water Co.*, 101 Wis. 259, 77 N. W. 722, 43 L. R. A. 117, 70 Am. St. Rep. 911. See, also, authorities cited and commented on in note appended to the case of *Railway Co. v. Weaver* (Kan.) 57 Am. Rep. 183-187.

In the New York Reports instances are to be found where some of the tribunals of that state at one time strayed from the path which all good courts should travel; but the true doctrine was expounded by its court of appeals in the case of *Baird v. Daly*, 68 N. Y. 547, and has since been consistently observed. More recently there have been other converts to the new faith which we now feel called upon to embrace. Notably among these is the supreme court of Minnesota; it having in the case of *Morse v. Railway Co.*, 30 Minn. 465, 16 N. W. 358, formally reviewed all of its prior decisions bearing on the point under consideration and pronounced them unsound, saying of the rule which had been laid down, "We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence." We may also point to the fate which befell an early Colorado case (*Railway Co. v. Miller*, 2 Colo. 442), the ruling in which is no longer given recognition by the courts of that state. *Electric Co. v. Lubbers*, 11 Colo. 505, 19 Pac. 479, 7 Am. St. Rep. 255; *Railroad Co. v. Morton*, 3 Colo. App. 155, 32 Pac. 345. The supreme court of New Hampshire has also reversed its position on the question. See *Aldrich v. Railroad Co.*, 67 N. H. 250, 29 Atl. 408, 58 Am. & Eng. R. Cas. 611, in which that court overruled a prior decision in the case of *Martin v. Towle*, 59 N. H. 31, to the effect that it was competent for the plaintiff to prove that, after he was injured by the overturning of a carriage belonging to the defendant, the latter discharged the driver thereof. So far as we have been able to ascertain, the courts of but two states still adhere to the view that one who is sought to be held accountable for an injury sustained by another cannot take additional precautions to prevent others from being likewise injured, without thereby tacitly admitting that such precautions should sooner have been adopted. *Railroad Co. v. McKee*, 37 Kan. 592, 15

Pac. 484; *Smelting Co. v. Tinchert*, 5 Kan. App. 130, 48 Pac. 889; *McKee v. Bidwell*, 74 Pa. 218; *Lederman v. Pennsylvania R. R.*, 165 Pa. 118, 30 Atl. 725, 44 Am. St. Rep. 644. Speaking for the supreme court of Kansas, Mr. Justice Valentine, in the case of *Railway Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176, undertook to defend the rule laid down in prior decisions therein cited; but the argument he advanced in its support impresses us as being far from convincing. Pennsylvania's pioneer case on this line is that of *Railroad Co. v. Henderson*, 51 Pa. 315, wherein the correctness of the ruling announced was assumed without any discussion whatever. It was subsequently held in *Railroad Co. v. McElwee*, 67 Pa. 311, that, "in an action for death by negligence from cars striking a cart on scales near to a railroad track, evidence was proper that after the accident the track was removed to a greater distance." With Quaker directness and simplicity, the question as to the admissibility of such evidence was dismissed with the remark (pages 314-315): "If the proximity of the track to the buildings did not increase the danger, why was it moved? Doubtless it was moved in order to insure greater safety in the future,—an act in and of itself perfectly legitimate, and prompted by a motive which was highly commendable." It may not be extravagant to say this action on the part of the company was something more than commendable, if at the time it had reason to apprehend that the ruling just referred to might be made. No one situated as was this company should be placed "in the embarrassing attitude of being compelled to choose between the risk of another accident by maintaining the status quo," and the equally uninviting alternative of taking proper steps to remove the danger, and thereby "making evidence against himself which would act prejudicially to his defense in the minds of the jury." *Railroad Co. v. Wyatt*, 104 Tenn. 434, 58 S. W. 308, 78 Am. St. Rep. 926. "The effect of declaring such evidence competent is to inform a defendant that, if he makes changes or repairs, he does it under penalty; for, if the evidence is competent, it operates as a confession that he was guilty of a prior wrong. \* \* \* True policy and sound reason require that men should be encouraged to improve or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrongdoers. A rule which so operates as to deter men from profiting from experience and availing themselves of new information has nothing to commend it, for it is neither expedient nor just." *Railroad Co. v. Clem*, 123 Ind. 18, 19, 23 N. E. 965, 7 L. R. A. 588, 18 Am. St. Rep. 303. To the same effect, see the admirable opinion delivered by Mitchell, J., in *Morse's Case*, 30 Minn. 468, 16 N. W. 358, and the irresistible argument on the same line presented by Watts, J., in *Railway Co. v. Burns*, 4 Tex. Law Rev. 54, 56, and quoted approvingly in *McGowan's Case*, cited *supra*. We do

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not hope to conceal the fact that, in thus concentrating our attack upon the decisions pronounced by the Kansas and Pennsylvania courts, instead of bringing prominently into view and assailing the prior decisions of this, our own court, we have yielded to an ordinary impulse of human nature. We do not, however, distinctly announce that those decisions are now overruled.

2. The only evidence introduced on the trial of the present case was the testimony of the plaintiff himself. He gave a clear and straightforward account of how he met with his injury, which was, in brief, as follows: He was attempting to pass "some mail under the grab" to the assistant postmaster at Sofkee, who "came out of his office just as the train was moving from the station, and the mail grab came in contact with a post that stood very close to the side of the car. \* \* \* The grab was wrenched from the side of the car," and plaintiff's left hand was caught by it and mashed against the car. The hand which was injured "was resting on top of the mail catcher." He held the mail in his "right hand, and stooped down to hand it under the catcher to the assistant postmaster, and the catcher came in contact with the post." A mail grab is made of iron, and "fits in a fastening on the side of the mail car, across the door, and works loose." It consists of a horizontal bar extending across the doorway, and a grab or "catch bar," operated by means of a handle from the inside of the car, which, when the contrivance is used in collecting mail at stations where the train does not stop, "pokes out and catches the mail bag as it hangs" on a crane erected near the track. It was the custom of the plaintiff to "deliver mail at Sofkee on the 'Shoo-Fly' trains by hands, and not with a sack." The assistant postmaster, who was also the agent of the railway company, had "to receive the mail at the car door." Plaintiff "had no right to leave [his] car and go and deliver the mail," his duty requiring him to be "at all times" in his car. "The reason [he] did not deliver the mail before the train started to pulling off was that the agent was inside of his office," and did not come to receive the mail till the train began to move. The post abovementioned was a semaphore post, and not a mail post. "There was no mail crane at that point. The grab is used for the purpose of taking the mail bag from the crane, and for no other purpose." The assistant postmaster "was standing five or six feet [from] the semaphore post when" the plaintiff "handed him the mail." Plaintiff rested his left hand "on the catcher, and handed the mail under the catcher with" his right hand; "was in a stooping position." He "had to stoop," and he rested his "hand on this grab as a support, and handed the mail underneath it, and in that condition this grab came in contact with the semaphore post." He "had to push this grab out thirteen or fourteen inches from the car in order for it to strike the post. It could not have possibly

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come in contact with the post unless it was pushed out, the post being off thirteen or fourteen inches. It would not have caught the post unless" the plaintiff had his "hand on it, and unless [he] pushed it out, either accidentally or purposely." He "had seen the semaphore post frequently," but had "never taken any particular notice of how close it was" to the track, "and didn't know how close it was." The plaintiff "had two newspapers to deliver" to the assistant postmaster at Sofkee; "could not have thrown them out, because they were not marked to 'throw out.' " In view of this evidence, it may be conceded not only that the railway company was negligent as alleged, but that the plaintiff, though he had frequently seen the post, was not himself guilty of any negligence in not taking note of its dangerous proximity to the track, and governing his actions accordingly. At the same time, however, he could not possibly have been injured had he not, "either accidentally or purposely," pushed the "catch bar" out some 13 or 14 inches from the side of the car, when there was no necessity to do so, nor, indeed, any occasion for him to make any use whatever of the contrivance known as the "grab." This being so, his own independent act, whereby the accident was brought about, is to be regarded as the proximate cause of his injury, and the company cannot be held accountable therefor. See *Hardwick v. Railroad Co.*, 85 Ga. 507, 11 S. E. 832; *Lindsay v. Railway Co.*, 114 Ga. 896, 41 S. E. 46; *Railroad Co. v. Scott*, 88 Va. 958, 14 S. E. 763, 16 L. R. A. 91, 52 Am. & Eng. R. Cas. 405 (note); *Railway Co. v. Sims* (Ind. App.) 63 N. E. 485. It follows that the trial judge erred in leaving to the jury the question of the company's liability, and in refusing to instruct them, at the instance of its counsel, to the effect that if they believed the injury to the plaintiff could not have occurred "but for his own conduct in pushing out the mail grab, whether intentional or by accident," he would not be entitled to recover.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

## HOUSTON &amp; T. C. R. Co. v. PHILLIO.

(*Supreme Court of Texas, Oct. 23, 1902.*)

[69 S. W. Rep. 994.]

**Stations—Assault on Passenger by Disorderly Person—Liability.\***

Where a carrier permitted a person in a drunken condition to enter its waiting room, and he used indecent language, and while armed

\*See *St. Louis, etc. Ry. Co. v. Wilson* (Ark.), 3 R. R. R. 793, 26 Am. & Eng. R. Cas., N. S., 793; *Birmingham Ry. Co. v. Baird* (Ala.), 22 Am. & Eng. R. Cas., N. S., 909; *Exton v. Central R. Co. of New Jersey* (N. J.), 14 Am. & Eng. R. Cas., N. S., 240, and note, 249 et seq.; *Cobb v. Boston Elevated Ry.* (Mass.), 21 Am. & Eng. R. Cas., N. S., 424, and foot-note; *Louisville & N. R. Co. v. McEwan* (Ky.), 17 Am. & Eng. R. Cas., N. S., 208, and foot-note.

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with a knife made an assault on plaintiff, a female passenger, the company was liable for damages sustained thereby.

**Rights of Person Accompanying Passenger.**

Where a husband went to defendant's station with his wife to assist her in boarding defendant's train, but without any intention of himself becoming a passenger, he was only entitled to the rights of a licensee, and was not entitled to recover against the company for an assault or indignity sustained by him at the hands of a disorderly person permitted to remain in the station.

**Error from court of civil appeals; Third supreme judicial district.**

**Action by Steve Phillio against the Houston & Texas Central Railroad Company. From a judgment of the court of civil appeals affirming a judgment in favor of plaintiff (67 S. W. 915), defendant appeals. Reversed.**

**Frank Andrews, for plaintiff in error.**

**E. T. Johnson, T. N. Graham, and N. J. Lewellyn, for defendant in error.**

**GAINES, C. J.** The following is the statement of this case, together with their conclusions upon the evidence, filed by the court of civil appeals: "This is an action by the appellee, Steve Phillio, against the railroad company to recover damages for injuries sustained, arising from the following state of facts, which are as substantially alleged in his petition: Plaintiff and his wife went to the depot of the appellant's road in the town of Calvert for the purpose of procuring a ticket for his wife to the town of Marlin. She at the time was sick and in feeble condition. While waiting in the waiting room of the depot for the train, and after the ticket had been purchased and the baggage checked, the defendant permitted one Allen, who was alleged to be a strong, active, and robust white man, and being in a drunken and rowdy condition, to sing vulgar and indecent songs and use vulgar and indecent language in the presence of plaintiff and his wife, and, being armed with a pocketknife open in his hand, make an unjustifiable assault upon the plaintiff and his wife, by which the plaintiff and his wife were greatly intimidated, causing them to become frightened, and causing the plaintiff's wife to become very nervous and sick. There are further allegations to the effect that the agent of the plaintiff at the depot at that time was present, and witnessed the assault and wrongful conduct as alleged, inflicted upon the plaintiff and his wife by Allen, or was in a position to see the same, and that no steps were taken by the agent to prevent the assault or the wrongful conduct complained of. Upon trial of the case below, verdict and judgment were in favor of the plaintiff for the sum of \$400. We find that the evidence in the record substantially sustains these averments, and the judgment and verdict below are supported by the evidence found in the record." The court of civil appeals found no error in the proceedings, and affirmed the judgment of the trial court.



We are of the opinion that the conclusions of that court, in so far as they pertain to the right of recovery by reason of the assault upon, and insulting conduct towards, the wife of the plaintiff, are correct, but do not concur in the proposition that the evidence showed any right of action in the plaintiff on account of the outrage of Allen upon himself personally. The wife, having entered the depot, and a ticket having been procured for her, became a passenger of the defendant company, and the duty devolved upon the company's agent to protect her against assault and insulting conduct on the part of third persons, provided he knew of such misconduct or had reasonable grounds to anticipate it. As to the plaintiff the case is different. He went to the depot merely to assist his wife in taking the train, and with no intention of becoming a passenger himself. He was there by the implied invitation of the company, and was not a trespasser. The railway company owed him the duty which is owed by the owners of property to persons who enter upon it by their invitation and no more. That duty is to use ordinary care to see that the premises are kept in a reasonably safe condition, so that persons entering thereupon by invitation are not injured thereby. *Hamilton v. Railway Co.*, 64 Tex. 251, 53 Am. Rep. 756; *Railway Co. v. East*, 66 Tex. 116, 18 S. W. 224. In the case of *Railroad Co. v. Crurk*, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443, the court say: "The defendant, in contracting to carry the passenger Naas in his sick and enfeebled condition, contracted an obligation which could only be carried out by Naas being carried upon the train and seated in the car. By thus contracting to carry Naas as a passenger, it took upon itself the obligation of allowing him assistants to place him upon the train and seat him in the car, and the compensation received by the defendant for conveying Naas from Mt. Vernon to his destination included as well the right to have assistants place him in the car as the carrying him after being so placed in the car, and the defendant owed the same obligation to his assistants while necessarily entering and leaving the car with Naas as it owed to Naas himself." So far as we have been able to discover, this case, in so far as it holds that the railway company owed the same duty to the assistants which it owed to the passenger, stands by itself, and unless there be a distinguishing feature in the fact that owing to the enfeebled condition of the passenger, which made it necessary for his friends to assist in boarding the train and securing a seat (which we doubt), it is in opposition to all the authorities upon the question.

Our conclusion is that, since the plaintiff was not a passenger, the defendant company did not owe him the duty of protection against the injurious actions of third persons, and that, therefore, he was not entitled to recover for the misconduct of Allen towards himself.

Therefore the judgment of the district court and that of the court of civil appeals is reversed, and the cause remanded.

**SIMMONS v. OREGON R. & NAV. CO.***(Supreme Court of Oregon, Aug. 25, 1902.)*

[69 Pac. Rep. 1022.]

**Injury to Passenger—Apparent Authority of Conductor to Receive and Carry.**

A conductor of a freight train having authority to receive and carry persons on his train on certain conditions, his action in receiving and carrying, in violation of his instructions, unauthorized persons ignorant of the limitations on his authority, is within his apparent authority; so that the carrier will be liable to such persons, as passengers, for injury from negligence of operators of the train.

**Same—Duty to Stop Train at Safe Place.\***

The carrier owes a passenger the duty of stopping the train at a place where he can, in the exercise of reasonable care, alight with safety; and it is not enough to stop at a place not suitable to him to alight, but convenient for its employees to do their work.

**Same—Evidence.**

Testimony of the conductor of a train on which a passenger was injured that he thought a passenger had alighted is immaterial; it appearing that he would not have done differently if he had known he was aboard, and that the accident occurred through failure of the engineer to obey signals.

**Same—Cross-Examination of Conductor.**

Defendant in action against a carrier for injury of plaintiff while a passenger cannot show, on cross-examination of the conductor, that before the train started plaintiff applied to him for permission to ride, and was told he could not without a permit or pass, and, being subsequently asked for transportation and found to have none, was told to get off at a station before that at which the accident occurred; the conductor's testimony in chief being confined to what occurred at the place of accident, and to the fact that the last time he saw plaintiff was  $2\frac{1}{2}$  miles therefrom, when he woke him, and told him the train was approaching the station.

On rehearing. Denied.

For former report, see 69 Pac. 440.

BEAN, J. The point is earnestly pressed that because, under the rules of the defendant, passengers were carried on freight trains only on the conditions and limitations set forth in form No. 208, the conductors of such trains had no authority, real or apparent, to bind the company by receiving any person on their trains as a passenger save on the conditions named; in other words, the effect of the argument, as we understand it, is that limitations on the authority of the conductor are binding on all persons riding on his train, whether known to them or not. Such a doctrine is, in our opinion, opposed to the authorities, and contrary to the rules governing the relation of principal and agent. It is common learning that a principal is bound, not only by the acts of his agent within the actual authority conferred upon him, but within his apparent authority, and that he cannot hold one out to the world as possessing authority over a given

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\*As to the carrier's duties in taking on and letting off passengers, see monograph appended to *Phillips v. St. Charles St. R. Co. (La.)*, 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

subject, and deny liability for his acts by relying upon some secret instructions not known to persons dealing with him. When, therefore, the defendant permitted and allowed persons to be carried on its freight trains at all, and under any conditions, as part of its general business, it necessarily invested the conductor of such train with authority to pass upon the question of whether one applying to ride should be allowed to do so, and to determine who should and who should not ride thereon. For that purpose, he stood in the place of the company, as its agent, and had authority to act for it. He was an agent invested with actual authority to receive and carry persons on his train on certain conditions, and if he violated his instructions, and carried unauthorized persons ignorant of the limitations on his authority, the company is, nevertheless, liable for an injury received by them through the negligence of the operators of the train. Counsel argues that a person riding on a freight train in pursuance of the rules, and under contract with the company, is not a passenger, and therefore defendant is not a carrier of passengers on such trains, and as a consequence the conductors thereof have no authority, actual or apparent, to receive persons in that capacity, or bind the company by so doing. The rules of defendant providing for and regulating the carriage of persons on freight trains designate them as "passengers," and, we think, manifestly properly so. Generally speaking, a passenger is one who travels in a public conveyance, by virtue of a contract, express or implied, with the carrier; and a carrier of passengers is one who undertakes to carry persons from place to place gratuitously, or for hire. 5 Am. & Eng. Enc. Law (2d Ed.) 480. It is obvious that in this sense a person riding on a freight train of defendant, in pursuance of its rules and by its consent, is a passenger. It is true he may be a passenger with restricted rights, as against the company, because of the terms of the contract under which he is being carried, but he is none the less a passenger. He is not a licensee, trespasser, servant, or employee of the company, but a passenger, and entitled to all the rights of such except as restricted by the terms of his contract, and the character of the train upon which he is riding. It is, therefore, within the general scope of the employment of the conductor of a freight train, under the rules of the company, to receive and carry passengers thereon, and we must adhere to the view heretofore expressed, that his act in so going is binding on the company, although he may have violated his instructions or its rules and regulations.

We do not deem it necessary to go with counsel through an exhaustive and critical review of the authorities, but since so much reliance seems to be put on *Powers v. Railroad Co.*, 153 Mass. 188, 26 N. E. 446, it is well to observe that in that case defendant was not carrying persons on its freight trains as a business. Moreover, the plaintiff, who had formerly been

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employed by the defendant, had received and receipted for books containing the rules of the company, and at the time of his injury was riding in a car "which he could not have failed to know was not intended or adapted for the use of passengers, but solely for the accommodation of the defendant's employees engaged in the operation of its trains;" which fact, of itself, was sufficient, under many of the decisions, to charge him with knowledge of the limitations on the authority of the conductor. In the case at bar, on the other hand, defendant assumed to carry on its freight trains all persons who complied with certain conditions, as a part of its general transportation business; and the car in which defendant was riding at the time of his injury was fitted up for the carriage of passengers, and was such as the defendant used on its regular freight trains for that purpose. It is therefore distinguishable from the Powers and all other similar cases, and, in our opinion, is in principle the same as the Lucas, Everett, Spence, and other cases cited.

There are several assignments of error not particularly noticed in the opinion, although substantially covered by it, to which our attention is again called. It is said the court erred in modifying the instruction, requested by the defendant, to the effect that if at Kamela the train was stopped at the proper place to enable the employees to do their work, and while so stopped the plaintiff had ample time and a reasonable opportunity to leave the train, but failed to do so, he could not recover, by inserting after the word "time" the words "suitable and safe place." There was no error in this. If the plaintiff was a passenger, or entitled to the rights of such, whether in the full sense of that term or not, the company owed him the duty of stopping the train at a place where he could, in the exercise of reasonable care, alight with safety; and this duty was not discharged by stopping at a place convenient for the employees to do their work, and giving him time to leave the train there, unless it was a suitable place for him to do so.

Again, it is urged that the court erred in not allowing the conductor of the train to state what his belief was as to whether plaintiff was aboard when the caboose passed the station going west. The conductor's belief upon this subject had no bearing upon the question of the negligence charged or the plaintiff's rights. The conductor testified that the accident occurred through the failure of the engineer to observe or obey signals, and that, even that if he had known the plaintiff was on the car, he would not have stopped it at the station to permit him to alight, because it was not customary to do so. His belief, therefore, did not affect his conduct, and was wholly immaterial.

Error is also predicated on the fact that the court would not permit the defendant, on the cross-examination of the conductor, to show, as it made an offer to do, that before the

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train left La Grande plaintiff applied to him for permission to ride, and was told that he could not do so unless he had a permit or pass; and that afterwards the plaintiff was asked for transportation, and, as he had none, was told that he must get off at Hilgard, a station east of Kamela. The witness' testimony in chief was confined to what occurred at Kamela, and to the fact that the last time he saw plaintiff was about 2½ miles east thereof, when he woke him up, and told him the train was approaching the station. Nothing was said by him as to how plaintiff came to be aboard the train, or by what authority he was riding thereon, or what occurred at La Grande, and therefore the testimony sought to be elicited by the cross-examination was not so intimately connected with the examination in chief as to make the ruling of the court error. If the offer to prove was true, the testimony would no doubt have been very material, but it was a part of defendant's case in chief, and could not be made out on the cross-examination of plaintiff's witness. The defendant subsequently called the conductor as its own witness, and examined him at length, but, as no such proof was made or offered, the ruling on the question of cross-examination, even if it had been error, would hardly justify a reversal of the judgment.

Petition denied.

## SNYDER v. LAKE SHORE &amp; M. S. RY. CO.

(*Supreme Court of Michigan, Sept. 17, 1902.*)

[91 N. W. Rep. 643.]

**Death of Boy—Measure of Damages—Probable Expense of Education—Maintenance—Instructions.**

In an action for negligently causing the death of a boy about 11 years of age there was evidence as to the probable earning capacity of boys of his age between that period and the age of 21, and testimony as to the special talent of deceased for certain work. The court read to the jury Comp. Laws, § 4847, requiring children of certain ages to attend school, and instructed that on considering the value of deceased's services the expense of educating him in the manner in which he would probably have been educated, and the number of years he would probably attend school, might be taken into account. This charge was preceded and followed by directions to consider the expense of deceased's maintenance and the probable expense of fitting him for his trade: *held*, that in the connection in which it was given the charge was not erroneous.

**Same—Same—Probable Earnings—Instructions.**

In an action for negligently causing the death of a boy between 11 and 12 years of age there was evidence tending to show that the deceased was specially adapted to a certain trade, and the court instructed that the fact that deceased showed some aptitude for a certain line of work did not by any means establish that he would be able, through such work, to earn large sums of money: *held*, that the instruction was not erroneous as invading the province of the jury.

**Same—Same—Same.**

An instruction that the evidence of special aptitude might be considered in determining the earning capacity of deceased was proper.



## Snyder v. Lake Shore &amp; M. S. Ry. Co

**Same—Damages.**

In an action against a railway company for negligently causing the death of a boy between 11 and 12 years of age, there was evidence tending to show that in a year from the time of his death deceased would have been able to earn from \$12 to \$15 per week, and some evidence that a boy of deceased's age would not earn more than the cost of his maintenance before reaching his majority: *held*, that a verdict for \$250 was not so grossly inadequate as to justify the granting of a new trial on that ground.

Error to circuit court, Kalamazoo county; John W. Adams, Judge.

Action by Gardiner F. Snyder, as administrator of the estate of Leo R. Snyder, deceased, against the Lake Shore & Michigan Southern Railway Company. There was judgment for plaintiff for a part of the damages claimed, his motion for a new trial on the ground of inadequacy of damages was overruled, and he brings error. Affirmed.

Howard, Roos & Howard, for appellant.  
Dallas Boudeman, for appellee.

MOORE, J. In May, 1901, Leo R. Snyder, plaintiff's intestate, was killed on a railroad crossing. Suit was brought, and a judgment rendered in favor of plaintiff for \$250. Plaintiff moved for a new trial. His motion was overruled. The case is brought here by the plaintiff by writ of error.

Two questions are involved: First. Did the judge err in his instructions to the jury in relation to the measure of damages? Second. Did the judge err in refusing to grant a new trial because the amount of the verdict was inadequate? Before answering these questions, a brief statement of facts is necessary. At the time of his death Leo R. Snyder was 11 years and 5 months old. He was a boy of intelligence, who was attending graded school, and who drove cows to pasture for his neighbors, and, when he had leisure, sold popcorn and peanuts. The father testified no plans had been made as to whether the boy should complete a course in the public schools. The testimony of his father was that he earned enough to pay for his own clothes, though it was not shown what the clothes cost. It was the claim of the plaintiff that his son had unusual aptitude for drawing and woodcarving; that he had some instruction from a relative, who was an engraver and designer; and that this boy, if he pursued that line of study, would make a skillful engraver and designer. None of his work was shown in evidence, and it was not shown he had ever earned anything as an engraver and designer. Against the objection of defendant, testimony was introduced of the following character: "Q. With this boy's aptitude for the business as you saw it, with proper instructions that you gave him, about how long would it be before he would, in your judgment, become proficient enough to earn money at the business? A. I think it would have taken him not over a year, and, if he had kept on at the way he was

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going at the time of his death until he was fifteen years old,—he was twelve at the time of his death,—he could have earned easily from \$12 to \$15 a week. Any one could with the talent that he had.” On the part of the defendant there was testimony introduced as to the earning capacity of boys, some of whom had been instructed in drawing, and others of whom had no instruction. It was the judgment of some of these witnesses that boys of the age of the deceased would not earn anything over and above the expense of their board, clothing, and education. The plaintiff offered the following request: “You are instructed that, if you find that the plaintiff is entitled to recover in this case, the measure of his damages will be the value of the service of his son during his minority, less the probable cost of his support and maintenance, as shown by the testimony in the case, taking into consideration the probability of the deceased living until twenty-one years of age, and also the probability of the father and mother of the deceased living until the deceased reached the age of twenty-one years.” This was not given, unless it was covered by the general charge, which was as follows: “In this case, if the verdict of the jury is for the plaintiff, it can only be for an amount that the boy Leo Snyder’s services would have been worth over and above the expenses of taking care of him, clothing him, and educating him from the time of his injury up to the time he was 21 years of age. In considering the question of how much the services of the said Leo Snyder would probably have been worth from the time of his injury up to the time that he was 21 years of age, over and above the expense of taking care of and clothing him and educating him in a manner which was probable that he would have been educated, the jury are entitled to take into consideration what the services of a boy, such as the testimony describes him to have been, would have fairly been worth ordinarily. While there has been testimony allowed in this case as to what wages have sometimes been paid boys for services in particular lines of business, this is not of itself conclusive as to what the services of this boy would have been worth. There has been evidence introduced on the part of the defendant on the question of the value of services of a boy of the age that this one was at the time of his injury and from that time up to the time he was 21 years of age, and the jury must make up their minds on this subject based upon facts, not upon any fancies which they may have in their minds, what would be the value, ordinarily, of the services of such a boy, over and above his expense as above set forth, as shown by the evidence. The jury has been allowed to hear the testimony of witnesses in different kinds of business, and in somewhat different stations or kinds of business life, giving their judgment as to what the value of the services of a boy would ordinarily be from the age of Leo Snyder up to the time that he was 21 years of age, over and above the cost and

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expense of raising him, and his cost and expense of living; and the jury are entitled to take this testimony into consideration with any other that may be in the case for the purpose of determining this question. The jury is instructed that the fact, if it be a fact, that the boy Leo Snyder was in the habit of making pictures or drawings, or was interested in that line of work, would not by any means establish as a fact in this case that he would at some future time be able, through any such work, to earn any large sums of money. You may consider that testimony, however, as bearing upon his possible earning power and ability had he lived. While this testimony was allowed to go in before the jury, it does not follow that the jury would be justified in determining that his services in the future would be worth what those of somebody else may have been in the line of business that was mentioned by the witnesses. It is not alone what a boy would probably earn from the time he was 11½ years old until he was 21, but the jury should consider also the amount of probable expense of raising, educating, clothing, and feeding such boy, and the payment of such other ordinary expenses as would naturally be expected to be paid for him during the years mentioned. In considering the question of the value of services, the jury have a right to consider from the testimony there is in the case what would probably be the number of years that the boy would attend school for the purpose of obtaining an education to fit himself for any particular line of work; and if, during a certain number of years of his life, he was not able to earn any money, or any great amount of money, but during such years, whether it would or would not be probable that money would have to be paid out for his care, keeping, and clothing, then as he grew older he would be able to earn more money, but still be obliged to pay for his keeping and clothing and ordinary necessary expenses,—all these things should be considered by the jury in determining what the net value of his services would be, if anything, for the whole period of time from his accident up to the time he was 21 years of age; and if, in considering all these facts, the jury believe that his services would not be worth anything in cash, then they are not entitled to find any damages beyond nominal damages in this case. In considering this question of damages the jury is not to take into consideration anything except the question of what his probable services would be worth from the time of his injury up to the age of 21 years, over and above his expenses as above explained, if he had lived. The jury cannot take into consideration, nor be in any way swayed in this case by, the grief which his death may have caused his parents, or any of his relatives, or by the loss of his society to them, or of any other facts in the case except that of loss of services; and consequently, however sad this accident may have been to his family, and however much sorrow may have been caused by such accident and by his death, is of no sort

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of consequence to this jury in determining the question that is before you to determine as to damages, if you come to a point of determining the matter of damages. If you find for the plaintiff, the verdict must be one based entirely upon monetary consideration for the value of services, less expenses, as above explained; and no other thing must enter into your consideration on the question of damages to be allowed. The law does not allow damages in this kind of a case for loss of companionship of the deceased, for sorrow on account of his death, for expenses for his burial, or for any other thing whatever except for the loss of services until he is 21 years of age, and no longer; and the jury must be governed by this law as given by the court, and apply no other rule to it. Upon this question of damages I further instruct you that, if you find the plaintiff is entitled to recover, you should take into consideration the probability of the deceased living to be 21 years of age; also the probability of his father and mother living until the boy attained 21 years of age. Also any liability to illness, and the liability of his inability to earn money, or for any other reasons which the testimony may show, inability to get employment, injury to any part of his person which might impair one's ability to earn money. You should, on this question, consider everything that would be likely to affect, favorably or unfavorably, his power to earn money. On this question, gentlemen of the jury, I think it best to read you the following provision of law, which now exists, and which counsel on both sides in their argument to you commented upon, so that there will be no mistake as to the law; and, as both counsel seem to differ a little about it, in view of that difference in the statement of the law to you, I thought best for me to read this section of the statute, which is plain English, and you can understand it fully as well or better than if I tried to state it to you in general terms." (The judge read to the jury section 4847, Comp. Laws, requiring the children within school ages to attend the public schools.) "You should weigh, gentlemen of the jury, with great care, this testimony upon the question of this boy's claimed adaptabilities to draw and carve, if you find he had such adaptabilities, and you should only allow damages upon this branch—if you come to the question of damages—after the most careful consideration of the testimony bearing upon the question, and after satisfying yourselves from the testimony that he had (if he had) such special adaptability to draw and carve as claimed by the plaintiff in this case, and, further, after being fully satisfied from the evidence that, if he did have such adaptability, he would have followed the business until arriving at 21 years of age. Would he have made a good workman at drawing, carving, etc.? Would he have followed it? Would he have received such wages as the witnesses testify are now being paid to draftsmen? Consider all these questions, all the testimony, all the matters and contin-

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gencies weighing for and against the question of his special adaptabilities, and decide it according to your own good judgment. Unless you are satisfied that he would have earned something because of this claimed drawing ability or his ability to carve, you must not allow anything for it. Now, I am not telling you, and do not mean, by this instruction, that you should not nor that you should allow anything on this account. I leave it to you wholly as a question of fact, and simply give you that instruction in view of that feature in this case, so that you will consider that branch of the case with great care."

It is insisted the following portions of the charge are incorrect: "In considering the question of how much the services of the said Leo Snyder would probably have been worth from the time of his injury up to the time that he was 21 years of age, over and above the expense of taking care of and clothing him and educating him in a manner which was probable that he would have been educated." "In considering the question of the value of services the jury have a right to consider, from the testimony there is in the case, what would probably be the number of years that the boy would attend school for the purpose of obtaining an education," etc. It is said the judge left the jury to speculate as to how many years of his minority the deceased would have probably attended school had he lived, and that the jury were not entitled to speculate upon the probable kind of an education the boy would receive, and the expense of it, and allow the railroad company to offset it against his earnings. These portions of the charge should be read in connection with what preceded and followed them. When that is done, we think the criticism is not well taken. The future of the boy was problematical. No definite plans had been made for his education. He had earned small sums of money, but it could not be said what sums he would be able to earn in the future. The testimony was not definite, nor was it conclusive. It was for the jury to take into consideration. We think the instruction was in harmony with the cases of *Cooper v. Railway Co.*, 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482; *Rajnowski v. Railroad Co.*, 74 Mich. 20, 41 N. W. 847; *Hurst v. Railway Co.*, 84 Mich. 539, 48 N. W. 44; *City of Elwood v. Addison* (Ind. App.) 59 N. E. 47.

The following portion of the charge was objected to: "The jury is instructed that the fact, if it be a fact, that the boy Leo Snyder was in the habit of making pictures and drawings, or was interested in that line of work, would not by any means establish as a fact in this case that he would at some future time be able, through any such work, to earn large sums of money." It is said that by this instruction the court invaded the province of the jury, and indicated what the evidence established. We cannot agree with counsel in this conclusion, but think the statement of the court is justified by



the facts and experiences of daily life. While it may be probable that a bright boy, selecting a calling for which he has a natural aptitude, will be successful in that calling, it does not follow as an established fact that a bright boy, who was shown an aptitude for a given calling, will follow that aptitude select the calling, and make a success therein. When the judge followed this portion of his charge by instructing the jury this testimony might be considered in connection with all the other testimony in determining the earning capacity of the boy, we think he properly instructed them.

The other criticisms of the charge have been considered, but will not be discussed.

We now come to the question, did the court err in refusing a new trial because the verdict was inadequate? In giving his reasons for refusing a new trial the circuit judge said: "Plaintiff insists that, the jury once determining that plaintiff was entitled to damages, then the jury was legally obliged to find damages larger in amount than were found. If the testimony in this case had all, or practically all, tended to show a minimum sum as a value of the services of plaintiff's intestate over and above his care, maintenance, and support, the jury has found a sum for the plaintiff much below a minimum sum as shown by the testimony, there might, under such circumstances, be good reason for urging that this verdict was inadequate. Defendant offered several witnesses, who testified that a boy such as plaintiff's intestate would earn nothing for his parents, over and above his maintenance and support, up to the time he became 21 years of age; so that there was testimony from which the jury could legitimately decide that plaintiff should recover nothing, or that he should recover some sum between nothing and the highest amount warranted by the testimony of plaintiff's witness. In a case such as this one, and under the same state of facts, a court ought to hesitate long before setting aside a verdict of a jury on a claim that the damages allowed are too small, and before setting aside a verdict on that ground the court should be able to conclude from the testimony, and be fully satisfied, that the testimony does not warrant the verdict as to the amount. I cannot say, from the testimony in this case that the jury was not entirely justified in fixing the amount of the damages at \$250, and must hold the amount as found fully sustained by the testimony." In *Cooper v. Railway Co.*, 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482, Justice Champlin, in speaking for the court, said: "The statute authorizes the jury, in every case of this kind, to give such amount of damages as they shall deem fair and just to the persons who may be entitled to the same when recovered. Under this statute the jury are not warranted in giving damages not founded upon the testimony, or beyond the measure of compensation for the injury inflicted. They cannot give damages founded upon their fancy, or based upon visionary estimates of proba-

*Macy v. New Bedford, etc., Ry. Co*

bilities or chances. The rule of damages in actions for torts does not apply to actions of this kind. The statute gives the right to damages; but it has been held, with rare exceptions, that they must be confined to those damages which are capable of being measured by a pecuniary standard. Cooley, Torts, 271, and cases cited in note 2." See, also, *Rajnowski v. Railroad Co.*, 74 Mich. 20, 41 N. W. 847; *Hurst v. Railway Co.*, 84 Mich. 539, 48 N. W. 44. There was no testimony from which the earning capacity of this boy could be computed to a mathematical certainty. It was a question about which different persons might and would disagree. Such testimony as the parties were able to produce was offered on each side. The weight of that testimony, its credibility, and the conclusions to be drawn from it were for the jury. There is a discussion of when the circuit judge ought to grant a new trial in *Wheeler v. Jenison*, 120 Mich. 422, 79 N. W. 643, and it will not be necessary to repeat what was said there. We are not satisfied the court erred in the exercise of his discretion in refusing a new trial.

Judgment is affirmed.

LONG, J., did not sit. The other justices concurred.

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*MACY v. NEW BEDFORD, M. & B. ST. RY. CO. (two cases).*

*(Supreme Judicial Court of Massachusetts, Bristol, Nov. 25, 1902.)*

[65 N. E. Rep. 397.]

**Street Railway—Injury to Passenger—Negligence—Question for Jury.**

Whether a street railway company was negligent in running an open car so fast around a curve that a passenger was thrown therefrom was a question for the jury.

Exceptions from superior court, Bristol county; Franklin G. Fessenden, Judge.

Actions by Eliza L. Macy against the New Bedford, Middleboro & Brockton Street Railway Company to recover for injuries received by her while a passenger on a street car, and by George I. Macy, her husband, against the same defendant, to recover for the loss of the services of his wife. At the close of the evidence defendant requested rulings that verdicts be ordered in its favor in both cases, on the ground that there was no evidence of negligence, and excepted to the court's refusal to so rule. Exceptions overruled.

Hosea M. Knowlton and Arthur E. Perry, for plaintiffs.

Richard P. Borden and Robt. C. Davis, for defendant.

BARKER, J. The only question before us is whether the evidence justified a finding that the defendant was negligent

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\*As to the proper management of conveyances carrying passengers, see monograph appended to *Frohriep v. Lake Shore & M. S. Ry. Co.* (Mich.), 4 R. R. R. 532, 27 Am. & Eng. R. Cas., N. S., 532.

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in running the car too fast. At the place of the accident the road had been in use only three weeks. The schedule time required the car to run 18 miles an hour, and it had just waited on a siding for a time estimated by different witnesses at from 4 to 10 minutes. Shortly after leaving the siding there were two curves, and the accident happened on the second curve. The car was an open one, with upright partitions behind the platforms, and with fixed seats on either side of the partitions, and reversible seats in the rest of the car. The plaintiff who was hurt rode in that end of the reversible seat nearest the front, which was on the outside of the curve. She testified that there was no cross bar near the floor under the fixed seat in front of her, and that she rode with her feet on the edge of the fixed seat and her arm around the stanchion at the end of the seat on which she sat. The plaintiffs contended that she was thrown from her seat by the combined effect of a lurch of the car and the centrifugal force due to the speed of the car on the curve.

Of 12 witnesses who were upon the car in such positions that she might have been within their vision, but one testified that she stood up before falling or being thrown off. From her own testimony and that of the other witnesses it could be found fairly that she did not rise voluntarily from her seat, but was thrown from it by the effect of a lurch combined with centrifugal force due to a great and unusual rate of speed, and that after clinging for an instant to the stanchion she was thus shaken to the ground by the motion of the car. The testimony as to the rate of speed was contradictory, but justified a finding that it was unusual, and that at the precise place of the accident it was more than 18 miles an hour, and, while a number of the witnesses noticed no lurch, several of them testified that there was one.

We are of opinion that the question whether the defendant was negligent was for the jury. To run an open car so rapidly over a curve upon a railway but very recently put in operation as to throw from her seat a passenger who was sitting as the injured plaintiff testified that she sat might be found by a jury to be less than the degree of care in the operation of its road required of a common carrier of passengers upon an electric street railway.

Exceptions overruled.

## FREEMAN v. PERE MARQUETTE R. CO.

(*Supreme Court of Michigan, Oct. 28, 1902.*)

[91 N. W. Rep. 1021.]

## Carriers—Personal Injuries—Contributory Negligence.

Where a passenger entered the caboose of a freight car, and, knowing that the train crew were still engaged in switching, sat down in a chair, instead of in the seats provided for passengers, he was not

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in the exercise of due care, and could not recover for injuries received by being thrown from his seat by the collision of a car with the caboose.

Error to circuit court, Ionia county; Frank D. M. Davis, Judge.

Action by Alonzo O. Freeman against the Pere Marquette Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Frederick W. Stevens (Charles McPherson, of counsel), for appellant.

Chaddock & Scully, for appellee.

**MONTGOMERY, J.** This is an action for negligent injury to a passenger, in which the plaintiff recovered a verdict and judgment of \$300, and defendant brings error.

The plaintiff became a passenger in a caboose attached to a freight train. Before entering the caboose, he accepted and signed a ticket in which he agreed to exercise the highest degree of care to protect himself from injury, and agreed, if injured notwithstanding such care, to make no claim against the company. The defendant, however, does not, in the brief filed in this court, rely upon this contract as conclusive of plaintiff's rights; but it is insisted that the plaintiff's testimony, taken as a whole, shows that he was guilty of contributory negligence, and that a verdict should have been directed for defendant. The testimony of the plaintiff tends to show that when he entered the caboose the back door of the caboose stood open; that he then knew that the train crew was still engaged in switching, and that cars were likely to be brought in contact with the caboose with greater or less force; that there was a chair in the caboose, not fastened down, and that there were abundant seats which were fastened solid; that this chair was the chair provided for the conductor, and for use in connection with the table in one corner of the caboose, provided for the conductor for making his memoranda upon; that, instead of taking one of the regular seats provided for passengers, plaintiff took a seat in this chair, facing the rear door, and awaited events; that he leaned over to sneeze, holding his head between his two hands, and just at this critical moment the collision occurred, threw him against the door, and caused the injuries complained of. So far as the contact of the car with the caboose is concerned, and the resulting jar, it may be said that it was the expected which happened. It is therefore a question of law as to whether, with this knowledge, it was the exercise of common prudence to take this loose seat, which was certain to be thrown a greater or less distance by any jar which might occur, instead of taking the fixed seats which were provided for passengers. There is no question of ample room in the seats, as plaintiff was the only passenger. The case of Railroad Co. v. Ferguson, 79

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Va. 241, is like this in principle. It was there held that it was contributory negligence, as matter of law, for a passenger on a freight train to take a chair near an open door in a caboose, instead of the fixed seat which was provided for passengers. So, in *Harris v. Railroad Co.*, 89 Mo. 233, 1 S. W. 325, 27 Am. & Eng. R. Cas. 216, 58 Am. Rep. 111, it was held that a plaintiff who knew, or by the exercise of ordinary care could have known, that the freight train upon which he was a passenger in the caboose had stopped to do switching, and that part of the train was likely to be backed against the part to which the caboose was attached, and who, without paying any attention to whether the cars were approaching or not, left his seat and stood up in the car, was guilty of such contributory negligence as bars recovery. A similar rule was laid down in *Smith v. Railroad Co.*, 99 N. C. 241, 5 S. E. 896, where the plaintiff was sitting on the arm of a seat when he had every reason to expect a sudden jolt or shock from the backing of one portion of the train against another. Plaintiff relies upon the case of *Moore v. Railroad Co.*, which was twice before the court, and is reported in 115 Mich. 103, 72 N. W. 1112, and again in 119 Mich. 613, 78 N. W. 666, and upon the case of *Stoody v. Railway Co.*, 124 Mich. 420, 83 N. W. 26. Neither case is authority for the plaintiff's recovery in the present case. In the *Moore Case* the collision occurred before the plaintiff had an opportunity to occupy a seat in the car. The collision occurred when he was in the act of sitting down. In that case, however, the rule was recognized that one who takes passage on such a train is presumed to understand that the cars must be coupled and uncoupled and shifted in the course of the yard work at the various stations, and that jars, jolts, jerks, and concussions are incident to the ordinary management, and that these necessarily affect the equilibrium of persons standing in the car. Applying that rule to the present case, it may be added that such jars and jolts would be known by the passenger to necessarily cause some change in position in the loose chair occupied by him. In *Stoody v. Railway Co.* it was held that the plaintiff was not guilty of contributory negligence in entering the car and taking his seat, although the rest of the train was then backing toward him. In that case it appeared that he had sufficient time to enter the seat and brace himself in the seat to avoid the jar,—a very different measure of precaution than taking a seat in a loose chair, facing an open door, as was done in the present case.

We are constrained to hold that, as matter of law, plaintiff was not in the present case in the exercise of due care, and the judgment will be reversed, and a new trial ordered.

LONG, J., did not sit. The other justices concurred.



**McGARRY v. HOLYOKE ST. RY. CO.**

*(Supreme Judicial Court of Massachusetts, Hampden, Oct. 29, 1902.)*

[65 N. E. Rep. 45.]

**Ejection of Passenger—Refusal to Pay Fare.**

Where an intending passenger on a street car asked the conductor if it was a M. P. car, and he answered that it was, and the car was not going to M. P., but returning therefrom, plaintiff, on its arriving at the terminus, could not ride from there to M. P. without the tender of another fare.

**Same—Use of Force.\***

Where a passenger on a street car refused to pay his fare when demanded, and made the conductor understand that he would resist being put off, the conductor was justified in using force in putting him off after for the third time telling him that he must pay his fare or get off.

Report from superior court, Hampden county; Justin Dewey, Judge.

Action by Thomas McGarry against the Holyoke Street Railway Company. Verdict directed for defendant, and case reported. Judgment on verdict.

Green & Bennett, for plaintiff.

Brooks & Hamilton, for defendant.

LORING, J. This is in an action for assault and battery. The plaintiff's story is that he hailed one of the open cars of the defendant on High street, in the city of Holyoke, near the city hall, when it was going in the direction of the post office, and asked the conductor whether it was a Mountain Park car. On being told that it was, he got on the car, paid five cents, the fare demanded, and rode to the terminus of the road at the post office, where the car stopped. The conductor then changed the trolley, and turned the backs of the seats so that passengers would face the other way. While the conductor was doing this, the plaintiff stood on the footboard, and when this was done, the plaintiff sat down on the same seat he sat on before. After the car had gone about as far as the city hall on the return trip, the conductor demanded of the plaintiff another fare. This the plaintiff refused to pay, on the ground that, when he boarded the car, he wanted to go to the park, and had asked if it was a Mountain Park car, and the conductor had said that it was. The conductor then told him that if he did not pay his fare he would call a policeman. Later the conductor came back, and said that the superintendent was on the car, and if the plaintiff did not pay his fare, he would have to put him off, upon which the plaintiff told the conductor to get the superintendent, and he would give him his reasons. The conductor did not bring the superintendent, but leaned over the seat, and said, "get off the car"; and added that if he had the plaintiff in some quiet

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\*See monograph appended to Birmingham Ry. & Electric Co. v. Biard (Ala.), 22 Am. & Eng. R. Cas., N. S., 909.

place he would break his face, or would like to do it. Later the car "was almost brought to a stop." The plaintiff was sitting near the outside end of one of the seats. No one else was sitting on that seat. The conductor came across from the other side of the car, in front of the seat on which the plaintiff was sitting, and said to the plaintiff that he must pay his fare or get off the car, and then, in the words of the plaintiff, "he took hold of me." "While he was pulling me, I got hold of some part of the car, to try to save myself." "I don't know whether I took hold of the end part of the seat I was sitting on with one hand, and the back of the seat with the other, and held back; I couldn't swear. I caught hold of something when he caught hold of me. He wasn't right off the car; he threw me off. I went off first. When I got off the car, he was on the headboard. He didn't go first. I didn't step on the footboard as I went off. I fell off the footboard into the street. He didn't give me a chance to step down on the footboard. I don't remember stepping on anything. I didn't grab hold of the post, and hold back, when I was on the footboard. I didn't grab anything, for the first thing I knew, when I left the seat, I was on the ground. I grabbed something, of course. When I went down, I struck on my head. There was a scar there at some time. There aren't any there now that I know of. There was a scratch on my face. I didn't have a doctor." On direct examination he said further: "He caught me by the arm and the sack coat"; and on cross-examination, that by the time he reached the ground, the car had stopped. The testimony of the plaintiff was confused. More than once he took back a previous statement; but we think that what we have said is a fair statement of his story, except in certain particulars, which we shall refer to later on.

1. We are of opinion that the plaintiff was wrong in refusing to pay the second fare. When he boarded the car, he did not ask whether the car was going to Mountain Park. What he did ask was, "If it was a Mountain Park car." That this was what he asked was testified to by the plaintiff on both direct and cross-examination. We do not think that this is modified, as the plaintiff contends, by this statement, that "I told him, when I got on the car, that I wanted to go to Mountain Park." This was testified to by the plaintiff when he was stating what was said when the conductor first asked for a second fare, and the plaintiff refused to pay it. Taken in connection with the statement made by him, on both direct and cross examination, that when he first got on the car he asked if it was a Mountain Park car, this must be taken to mean that the plaintiff then told the conductor that he "wanted to go to Mountain Park" when he got on the car. The conductor might have thought that the plaintiff took the car on its trip from the park to the city to make sure of a seat on its return trip to the park, or that he asked the question to identify the route on which the car was then proceeding.

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But it was not for the conductor to speculate as to the plaintiff's purpose in taking the car. The plaintiff asked a plain question, and the conductor gave a correct answer. It is perhaps worthy of notice that the plaintiff on cross-examination admitted that he knew that Mountain Park lay on the other side of the Holyoke dam, and that he would not go in the direction the car was going when he boarded it, to go to Mountain Park. He "thought probably they would turn round. I knew there was a trolley car ran right around." There is nothing in the plaintiff's contention that he was justified in thinking that the car was on its way to the park, and refusing to pay his fare, because it had on it the sign "Mountain Park," and he had noticed that on other cars run by the defendant the sign was changed when the cars were running in different directions, and always had a sign exposed to indicate the terminus they were bound for. The defendant was not bound to adopt the same system on all its cars.

2. The plaintiff's second contention is that on the evidence the jury might have found that the defendant used unnecessary force. But we are of opinion that, looking at the plaintiff's story fairly, as between the two parties, it does not warrant such a finding. It is true that the plaintiff says that he landed on his head in the street, and went off the car without touching the footboard. It is also true that he testified that the car had not stopped when the conductor began to put him off; but he admits that when the conductor undertook to put him off, the car was nearly at a standstill, and when he was put off, it had entirely stopped. The conductor could not but have understood that the plaintiff meant to resist being put off. The plaintiff's suggestion that he "got hold of some part of the car, to save himself," when construed with the rest of the testimony, cannot be taken to mean that he did not intend to resist, and did not take hold of the car for that purpose. If the plaintiff made the conductor understand that he would resist being put off, the conductor was justified in using force in putting him off, especially after again telling him, and for the third time, that he must pay his fare or get off. If the conductor had to use force to put him off, and the plaintiff resisted, the mere fact that he landed on his head is not sufficient to warrant a finding that undue force was used. It would have been better if the car had actually stopped before the conductor put his hands on him; but the plaintiff admits that it had then "almost stopped," and "by the time he had me off the car, I guess the car was stopped. In another place he went further, and admitted that "when the car was stopped, I was sitting more to the left-hand side of the seat. He came in there, and he took hold of me." But we assume that the jury could have found that the former statement was true, and that the car had not altogether come to a stop when the conductor laid hold of the plaintiff.

Judgment on the verdict.

**BIRMINGHAM RY., LIGHT & POWER CO., v. OWENS.***(Supreme Court of Alabama, Nov. 20, 1902.)*

[33 So. Rep. 8.]

**Street Railroads—Injury to Passenger—Evidence.\***

Where, in an action by a passenger for injuries received in alighting from a street car, he testified that the car was stationary when he attempted to alight, and was suddenly started, and four wholly disinterested witnesses testified that it was going about 10 miles an hour, the preponderance of evidence so clearly establishes the absence of negligence on the part of defendant, and the want of due care on the part of plaintiff, that a refusal of defendant's motion for new trial on a verdict for plaintiff was error.

Appeal from circuit court, Jefferson county; A. A. Coleman, Judge.

Action by Samuel L. Owens against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed and new trial granted.

Walker, Tillman, Campbell & Walker, for appellant.

Bowman, Harsh & Beddow, for appellee.

**McCLELLAN, C. J.** The testimony of the plaintiff alone tends to show that the car was stationary when he attempted to alight from it, and that when he was in the act of alighting it was put in motion with a jerk which threw him to the ground, and inflicted the injuries of which he complains. Four wholly disinterested witnesses testify that the car was in rapid motion, going from 8 to 12 miles an hour, when the plaintiff attempted to alight, and that it was this motion of the car, well known to him, of course, which caused his fall and injuries. Their testimony is corroborated by undisputed evidence as to other circumstances of the occurrence,—the location of the accident at a place where it was not customary or proper for cars to stop; the juxtaposition of plaintiff's boarding house; the extreme violence of the fall, he being turned topsy-turvy thereby, and lighting on his head, so that his attitude when he struck the ground was much that of a man standing on his head (a thing, we take it, much more likely to occur when a man unaccustomed to the feat attempts to get off a rapidly moving car, than when he falls in consequence of a stationary car being put in motion when he is in the act of alighting), etc.; and the plaintiff's testimony is wholly lacking in corroboration of any sort. This state of case shows so clearly to our minds that the preponderance of the evidence was so greatly against the verdict for the plaintiff,—so clearly establishes both the absence of negligence on the part of the defendant, and the want of due care on the

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\*As to the effect of contributory negligence in alighting from a moving train, see foot-note appended to *Pittsburgh, etc., Ry. Co. v. Grey* (Ind. App.), 4 R. R. R. 120, 27 Am. & Eng. R. Cas., N. S., 120.

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part of the plaintiff,—that we feel justified in affirming, the presumption of the correctness of the trial judge's action to the contrary notwithstanding, that the court below erred in denying defendant's motion for a new trial. *Railway Co. v. Clay*, 108 Ala. 233, 19 South. 309; *Teague v. Bass* (Ala.) 31 South. 4.

The judgment for plaintiff and the order overruling the motion for a new trial must be reversed. A judgment will be here entered granting the motion and setting aside the verdict. The cause will be remanded. Reversed, rendered in part, and remanded.

## CHICAGO TERMINAL TRANSFER R. CO. v. SCHMELLING.

(*Supreme Court of Illinois, June 19, 1902.*)

[64 N. E. Rep. 714.]

## Injury to Passengers—Contributory Negligence—Appeal—Review.

Where, in an action by a passenger against a railroad company for injuries received on alighting from the train at a regular stopping place, the court instructed the jury at defendant's request to take into consideration the fact, if it was a fact, that plaintiff alighted from the train while it was in motion in determining whether he was using due care, defendant could not urge in the supreme court that such conduct was negligence per se or as matter of law.

## Same—Safe Landing Place—Stop, Look and Listen.\*

A passenger, in alighting from a train at a regular stopping place, may assume that a safe means of passage from the train has been provided, and is not required to stop, and look and listen, to see whether a train is approaching on a parallel track, before attempting to cross it.

## Same—Same.†

Where passengers, in alighting from trains at a regular stopping place, are required to step into a space between five and seven inches below the level of the tracks, filled with stone and sand, and not wider than six feet, located between the tracks of two railroad companies, the company will not be deemed as a matter of law to have fulfilled its duty of providing a safe and convenient mode of access to and departure from its trains.

## Who Are Passengers‡—Appeal—Review.

Where the jury, under proper instructions, found that a person who had alighted from a train and was standing on the narrow space between the railroad tracks provided by the company as the place to alight was still a passenger, the supreme court cannot as a matter of law say that such relation had ceased.

## Failure to Provide Safe Place to Alight—Proximate Cause Where Passenger Injured on Track of Another Company.

The fact that a passenger, while standing on the space between two tracks provided by the railroad company as the place for passen-

\*See note, 12 Am. & Eng. R. Cas., N. S., 302 et seq.

†As to the duties of carriers of passengers with respect to stations and stopping places, see monograph appended to *Muhlhouse v. Monongahela St. Ry. Co.* (Pa.), 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.

‡As to who are passengers, see foot-note appended to *Purple v. Union Pac. R. Co.* (C. C. A.), 3 R. R. R. 711, 26 Am. & Eng. R. Cas., N. S., 711.



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gers to leave the train, was struck and injured by a train on the other track belonging to another company, does not relieve the carrier from liability; the failure to provide a proper place for alighting being a proximate cause of the accident.

**Error to appellate court, First district.**

Action for personal injuries by Robert Schmelling against the Chicago Terminal Transfer Railroad Company. From a judgment of the appellate court (99 Ill. App. 577) affirming a judgment in favor of the plaintiff, the defendant brings error. Affirmed.

This is an action on the case, brought by Robert Schmelling, defendant in error, against the Chicago, Burlington & Quincy Railroad Company and plaintiff in error, the Chicago Terminal Transfer Railroad Company. Some of the allegations of negligence in the two counts of the declaration were joint as to both defendants and also several as to each of them. A plea of not guilty was filed by each defendant. At the close of the plaintiff's evidence he entered a nonsuit as to the Chicago, Burlington & Quincy Railroad Company. Subsequently the trial resulted in verdict and judgment in favor of the defendant in error. Upon appeal to the appellate court, the judgment of the superior court of Cook county was affirmed. The present appeal is prosecuted from such judgment of affirmance.

On August 8, 1898, appellee boarded an early morning train of the appellant, as a passenger, at Fifty-First street, in Chicago, for the purpose of riding to Twenty-Sixth street in that city. Plaintiff in error's train, upon which appellee was thus a passenger, consisting of about four cars besides the engine, was what was called a "workingmen's train," used for the purpose of carrying workingmen early in the morning to their work. The train arrived at its stopping place at Twenty-Sixth street a few minutes after 6 o'clock, and, in dismounting from the train at that point, appellee was struck by the engine of a freight train upon the track of the Chicago, Burlington & Quincy Railroad, and suffered the injury for which the present suit is brought. For some 70 or 75 feet south from the point where the defendant in error was struck, the track of the plaintiff in error and the track of the Chicago, Burlington & Quincy Railroad Company run parallel and directly south; but, when this distance of 70 or 75 feet is reached, both tracks make a curve to the west. The westerly rail of the westerly track of the Chicago, Burlington & Quincy Railroad was distant toward the east from the easterly rail of the easterly track of the plaintiff in error, about 1½ or 2 feet according to some of the testimony, about 6 feet according to other evidence, 7 or 8 feet according to some of the witnesses, and as much as 8 or 9 feet in the opinion of one of the witnesses. The evidence tends to show that the appellee, when he went upon the train, paid his fare and took his seat in the first car. When the car reached

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Twenty-Sixth street, the conductor called out the station, known as "Twenty-Sixth Street," at the back door in the rear end of the car. Defendant in error, when he heard the announcement of the conductor, got up and walked out upon the front platform, and he says: "The train stopped, and I got off." If the train had not actually stopped when defendant in error got off, it was "slowing up" to make the stop. He alighted from the easterly front platform of the front car of the train, and moved directly east. He was in the habit of going to work on that train in the morning, and had been in the habit of doing so for nearly a year and a half. He worked at that time in a lumber yard east from the Twenty-Sixth street station, to reach which he would go one block to Western avenue, and then up Blue Island avenue to the lumber yard. The step of the platform where he dismounted, was about 18 inches or 2 feet from the ground. He walked two steps, and was about to step upon the track of the Chicago, Burlington & Quincy Railroad Company, when some one called to him, and he turned around toward the north, and was struck by a locomotive of the Chicago, Burlington & Quincy Railroad Company, about two or three minutes, as he says, after the time when he jumped off the platform. It is admitted that trains on the road of the plaintiff in error regularly stopped at Twenty-Sixth street, that there was a railroad crossing just south of the line of Twenty-Sixth street, that every train going north stopped close up to the crossing, that every train going south stopped close up to Twenty-Sixth street, that the train that morning stopped at the usual place of stopping to let on and off passengers going north, and that this stopping place is advertised as such on the company's time-tables. Just east of the track of plaintiff in error, from which defendant in error alighted, are two more tracks of the Burlington & Quincy Railroad Company, and east of them a switch track of the same company. Just west of the track of the plaintiff in error, on which the car in which defendant in error was a passenger stood, are another track of the plaintiff in error and also a side or switch track of the same company. Just north of the place of the accident, two tracks of the Santa Fe road run at right angles across the tracks of the plaintiff in error and the Chicago, Burlington & Quincy Railroad. Just north of the Santa Fe track is Twenty-Sixth street, but there is no sidewalk on the south side of Twenty-Sixth street. In the middle of Twenty-Sixth street are two tracks, on which run electric cars east and west. The business of defendant in error was that of a bricklayer. At this Twenty-Sixth street stopping place plaintiff in error had no depot or platform of any kind or description. The ground between the track of plaintiff in error and the track of the Chicago, Burlington & Quincy Railroad was between five and seven inches below the level of the tracks. It was not boarded, but composed of stone and sand. Just how much space there was between the

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train of plaintiff in error, as it stood at the time of the accident, and the Chicago, Burlington & Quincy train, as it passed, is not altogether clear from the evidence. One of the witnesses says that there was just enough room for a man to stand. The freight train of the Chicago, Burlington & Quincy Railroad Company consisted of some 16 or 18 empty stock cars and one way car. The tender of the engine of the latter train was in front. The train of the plaintiff in error going north overtook the Chicago, Burlington & Quincy train and passed it, but immediately began slowing up, so that it had "slowed up" and stopped for the Santa Fe crossing, while the Chicago, Burlington & Quincy train was passing it. It is admitted that the place where the train of plaintiff in error stopped was not only a regularly advertised stopping place of the train in question, but was a statutory stopping place.

Jesse B. Barton, for plaintiff in error.

Kickham Scanlan and Edgar L. Masters, for defendant in error.

MAGRUDER, C. J. (after stating the facts). If the acts of negligence charged in the declaration against the Chicago, Burlington & Quincy Railroad Company alone be eliminated, the acts of negligence charged in the declaration against the plaintiff in error are that it did not provide a suitable platform or other means for passengers to safely alight from its cars at Twenty-Sixth street, and failed to keep its railroad at a safe and suitable distance from that of the Chicago, Burlington & Quincy Railroad Company, and also failed to provide means for crossing the Chicago, Burlington & Quincy Railroad in safety.

1. The first point made by the plaintiff in error is that the trial court erred in overruling its motion to take the case from the jury at the close of all the evidence, and in refusing to give its instruction, then asked and offered in writing, directing the jury to find it not guilty. This instruction was properly refused, if there was evidence tending to show the right of the defendant in error to a recovery, because in such case there must be a submission to the jury. *Landgraf v. Kuh*, 188 Ill. 484, 59 N. E. 501; *Railway Co. v. Baddeley*, 150 Ill. 328, 36 N. E. 965; *Railroad Co. v. Filler*, 195 Ill. 9, 62 N. E. 919. The plaintiff in error contends that there is no evidence tending to show that at the time of the injury the defendant in error was in the exercise of ordinary care for his own safety. As we understand the argument of counsel upon this branch of the case, his contention is that defendant in error was guilty of negligence, as matter of law, upon two grounds. The first ground is the charge that the defendant in error alighted from the car while it was in motion. In support of this position authorities are referred to holding, in substance, that it is negligence for a passenger to alight from a moving train of cars, the motive power of which is steam. *Railway Co. v.*

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Meixner, 160 Ill. 320, 43 N. E. 823, 31 L. R. A. 331, and cases cited. In the case at bar there was evidence to the effect that, when the defendant in error alighted from the car on which he was riding, the train had stopped. There is other testimony tending to show that, while the train had not actually stopped, it was moving very slowly. One of the witnesses testifies that the train of the plaintiff in error, on which the defendant in error was riding, stopped about 7 feet south of the Santa Fe tracks, so that there were 7 feet clear between the front of the engine and the Santa Fe tracks; and at the same time he states that the train was about 10 or 15 or 20 feet south of the Santa Fe tracks when the defendant in error was struck. It follows that the train moved a distance only of from 3 to 13 feet northward before it stopped after defendant in error alighted from it. It must, therefore, have been moving very slowly. But whether he alighted from the train after it stopped, or while it was "slowing up" for the purpose of stopping, was a question of fact for the jury to determine. The judgment of the trial court, and the judgment of the appellate court affirming it, settle this question of fact so far as we are concerned. The plaintiff in error asked no instruction from the court, holding that the alighting of the defendant in error from the train while it was in motion, if he did alight while it was in motion, constituted negligence in law. On the contrary, the plaintiff in error asked, and the court gave in its behalf, an instruction to the following effect: "If the jury believe from the evidence that the plaintiff left the car of the defendant Chicago Terminal Transfer Railroad Company while the same was in motion, and if they further believe from the evidence that he knew of the proximity of the tracks of the Chicago, Burlington & Quincy Railroad Company, they may take these facts into consideration in determining whether plaintiff was exercising due care and caution for his own safety." Inasmuch as the plaintiff in error asked, and the court gave, an instruction which left it to the jury to take into consideration the fact, if it was a fact, that the defendant in error alighted from the train while it was in motion, in determining whether he was in the exercise of due care and caution for his own safety, it cannot be urged now and here by the plaintiff in error that such fact was negligence per se, or negligence as matter of law.

The second ground upon which it is charged that defendant in error was guilty of a want of due care for his own safety is that he did not stop, and look along the tracks of the Chicago, Burlington & Quincy Railroad Company to see whether a train was approaching, before he stepped upon one of the rails of the track of that company. The evidence is clear and positive that defendant in error did not see the approach of the train which struck him. The engineer and fireman of the train from which he alighted swear that they did not see the approach of the train which struck him until

the train was upon him, or not more than six feet from him. The curve in the tracks at this point prevented a clear view of an approaching train on the parallel track. The defendant in error had not taken any position upon the track of the Chicago, Burlington & Quincy Railroad Company. He had merely put his foot upon the west rail of the track with a view to crossing to go to Twenty-Sixth street; but, upon receiving a warning, he took his foot off the rail, and was standing in the space between the track of the plaintiff in error and the track of the Chicago, Burlington & Quincy Railroad Company, when he was struck. The engine, or tender, or car, which struck him, projected over into the space between the two tracks about a foot and a half. This court has often decided that the failure to look and listen before crossing a railroad track does not constitute negligence as a matter of law, but is merely a circumstance which the jury may take into consideration in determining whether or not the party injured was guilty of negligence. *Railroad Co. v. Harrington*, 192 Ill. 9, 61 N. E. 622. Here, however, the plaintiff in error did not ask any instruction, so far as we have been able to discover, which holds that as matter of law it was negligence in the defendant in error not to look and listen for an approaching train. The refusal of such instruction, if it had been asked, would not have been error, because it was not the duty of the defendant in error, when alighting from the train, to look out for engines or cars that might be approaching upon the track east of the track on which the train from which he had alighted stood. It was the duty of the plaintiff in error to provide a safe means of access to and from its station at Twenty-Sixth street for the use of its passengers; and the defendant in error had a right to assume that the place adopted for discharging its passengers at that point was safe. *Thomp. Carr.* 261; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713; *Railway Co. v. Ward*, 135 Ill. 511, 26 N. E. 520; *Railroad Co. v. Wilson*, 63 Ill. 167; *Railroad Co. v. Winters*, 175 Ill. 293, 51 N. E. 901. In *Pennsylvania Co. v. McCaffrey*, we said (page 176, 173 Ill., page 715, 50 N. E.): "A passenger is justified in assuming that the company has, in the exercise of due care, so regulated its trains that the road will be free from interruptions or obstructions, when passenger trains stop at the depot to receive and deliver passengers. In leaving the train the passenger has a right to assume that the company will not expose him to any danger which by the exercise of due care can be avoided, and that the company has done its duty in the matter of providing him safe landing."

This brings us to the second contention of the plaintiff in error upon this branch of the case, namely, that the evidence does not tend to show any negligence on its part which resulted in injury to the defendant in error. We are of the opinion that there is evidence tending to show such negli-



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gence. The law is well settled that the carrier must use the highest degree of care which is practicable in order to provide passengers with a safe passage from its trains. As is said by Mr. Bishop, in his work on Noncontract Law (section 1086): "The tracks around the platforms and places for entering and leaving the cars \* \* \* should be made safe and kept so." Here it is admitted that there was a regular statutory stopping place at Twenty-Sixth street, where the train upon which the defendant in error was riding stopped. But there was no depot or platform either on the east or west side of the train. Passengers who alighted from the train were obliged to step upon the ground into a space between five and seven inches below the level of the tracks, not boarded, but filled with stone and sand, not wider than four, five, or six feet, located between the tracks of two railroad companies, and subject to being narrowed still further by the projection of cars for a distance of a foot and a half over such space upon each side thereof. We are not prepared to say that, in view of the character of the place, where passengers were thus obliged and invited by the plaintiff in error to alight for the purpose of approaching Twenty-Sixth street, there was such a safe means of departure from its trains as plaintiff in error was bound, under the law, to furnish to its passengers. Upon this subject the jury were properly instructed by the court on behalf of both parties. The court instructed the jury, on behalf of the defendant in error, that a railroad company in the business of carrying passengers is bound to exercise due care, consistent with the nature of its business and practical operation of its railroad, in providing a safe and convenient mode of access to its trains and departure from its trains at stations or stopping places used by them as places for taking on and discharging passengers from their trains. The court also instructed the jury, in behalf of plaintiff in error and at its request, that, if they believed from the evidence that the defendant in error paid his fare to the conductor of the plaintiff in error for a passage from Fifty-First street to Twenty-Sixth street, then it became the duty of the plaintiff in error to carry him to its usual place of stopping nearest Twenty-Sixth street, and to furnish him with a safe place to alight from the train, and a safe passageway from such place of alighting to Twenty-Sixth street. These instructions were in harmony with the authorities hereinbefore referred to.

2. It is alleged by the plaintiff in error, in the second place, that defendant in error was not a passenger of the plaintiff in error at the time the accident occurred. Counsel for plaintiff in error does not state in what way the question thus presented arises; but, while it is true that it is a question of law what facts will create the contract relation of carrier and passenger, yet it is the duty of the court to give a proper instruction, informing the jury what facts will be sufficient evi-

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dence of the contract, when the existence of such relation is in controversy. *Railroad Co. v. Jennings*, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827. In the case at bar such instructions were given. The duty of a carrier to its passengers is, not only to exercise the highest degree of care and prudence in carrying them to their destinations, but also to afford them reasonable opportunities to leave the trains of the company with safety. *Railroad Co. v. Jennings*, supra; *Pennsylvania Co. v. McCaffrey*, supra. The relation of carrier and passenger does not terminate until the passenger has alighted from the train and left the place where passengers are discharged, and the duty of the carrier to its passenger continues until the passenger has had a reasonable time in which to leave the depot or alighting place. What is such reasonable time must often depend upon the circumstances of the particular case. 4 Elliott, R. R. § 1592. In *Pennsylvania Co. v. McCaffrey*, we said (page 173, 173 Ill., page 714, 50 N. E.): "This relation between a passenger and a railroad company does not cease upon the arrival of a train at the place of the passenger's destination, but the company is still bound to furnish him an opportunity to safely alight from the train. It is its duty, not only to exercise a high degree of care while the passenger is upon the train, but also to use the highest degree of care and skill reasonably practicable in providing the passenger a safe passage from the train." In the case at bar, when the defendant in error was injured, he was still upon and within the narrow space between the railroad tracks, which was the only place which the plaintiff in error had provided for him to stand upon when he alighted from the train. Therefore we are not prepared to say that defendant in error had ceased to be a passenger. Laying down proper definitions of what constituted the relation between carrier and passenger, the instructions on both sides left it to the jury to determine whether such relation existed between plaintiff in error and defendant in error at the time of the accident. The juxtaposition of the tracks rendered it dangerous to stand or walk between them while trains were passing, and hence the failure to provide a proper place for alighting contributed to the injury, even though the immediate and direct cause of the injury was the blow from the engine of the Chicago, Burlington & Quincy Railroad Company. The fact that defendant in error was struck by an engine of the Chicago, Burlington & Quincy Railroad Company does not absolve plaintiff in error, inasmuch as its negligent conduct caused the defendant in error to be placed in a position where he would be so struck. There may be several substantive causes of an accident; but, if one which is proximately connected with it is proven, it is sufficient. Proximate cause, in law, is a cause from which a man of ordinary experience and sagacity can foresee that the result may probably follow. *Express Co. v. Risley*, 179 Ill. 295, 53 N. E. 558; *City of Dixon v. Scott*, 181 Ill. 116, 54 N.

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E. 897; *City of Rock Falls v. Wells*, 169 Ill. 224, 48 N. E. 440. "It is well settled that, where the injury is the result of the negligence of the defendant and that of a third person, of the defendant and an inevitable accident, or an inanimate thing has contributed with the negligence of the defendant to cause the injury, the plaintiff may recover, if the negligence of the defendant was an efficient cause of the injury." *Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215.

3. The third point, insisted upon by the plaintiff in error, is that the first instruction given in behalf of the defendant in error is erroneous. By that instruction the court told the jury that, if the plaintiff had proven "all the material allegations of his declaration by a preponderance of the evidence in manner and form as he has alleged them in his declaration, he is entitled to recover in this case." The objection to the instruction is that it leaves it to the jury to determine what allegations of the declaration are material. In *Railroad Co. v. Bailey*, 145 Ill. 159, 33 N. E. 1089, it was held that such an instruction was undoubtedly erroneous, upon the ground that the question as to what the material allegations of a declaration are is a question of law, and should not be submitted to the jury. But we are of the opinion that this instruction could have been productive of no harm, for the reason that other instructions given to the jury, on behalf of both the parties, fully informed them what facts must be proven, in order to entitle the plaintiff to recover. Quite a number of instructions, asked by the plaintiff in error and given for it, told the jury that, in order to entitle the defendant in error to a recovery, he must have been in the exercise of due care and caution for his own safety; and other instructions told them that, in order to justify a recovery, the proof must show that the plaintiff in error was guilty of such negligence as contributed to the accident. Some of these instructions, in stating what acts would show a failure to exercise due care and caution, and what acts would not constitute negligence, were really more favorable to the plaintiff in error than the established principles of the law would justify.

The judgment of the appellate court is affirmed.

Judgment affirmed.

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NORMILE *v.* OREGON R. & NAV. CO.

(*Supreme Court of Oregon*, Aug. 11, 1902.)

[69 Pac. Rep. 928.]

**Carriers of Live Stock—Limiting Liability—Variance.**

Plaintiff having sued defendant as a common carrier on its common-law liability, and a valid contract limiting its liability to a stipulated value of the stock shipped appearing, there is a fatal variance.

**Same—Cause of Action.**

Plaintiff, having sued defendant on its liability as a common carrier, cannot recover on its liability as a warehouseman.

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**Same—Termination of Liability.**

Whether a carrier's liability as such has ceased where it unloads a mule, and secures it only to a light plow, painted red, is a question for the jury.

**Same—Agreement for Unloading.**

Notwithstanding stipulation in bill of lading that the shipper shall unload the stock, the carrier undertaking to do this without notice to the shipper is liable for negligence therein.

**Same—Part Exemption from Liability for Negligence.\***

A common carrier cannot, even in part, exempt itself from liability for injury from its negligence to stock shipped, even in consideration of a lower tariff.

**Same—Same.†**

A contract of shipment of live stock, providing that the stipulated tariff is less than that for transportation at carrier's risk, and is given in part consideration of shipper's agreement to limitation of carrier's liability, and that it is agreed the value of the stock does not exceed \$100 per head, does not make a partial exemption from liability for negligence, but a valid valuation; it not being shown that it was not entered into freely by the shipper, or whether he could have obtained other terms on a higher valuation.

Appeal from circuit court, Clatsop county; T. A. McBride, Judge.

Action by S. Normile against the Oregon Railroad & Navigation Company. Judgment for plaintiff. Defendant appeals. Reversed.

This is an action to recover the value of a mule, which, with other stock, the defendant, it is alleged, undertook and agreed, for the consideration of \$15, to transport from Portland to Astoria, skillfully and safely, and there deliver to plaintiff in good condition. It is further alleged that the defendant is a common carrier, and engaged in that business, and that it placed the stock, consisting of eight head of horses and two head of mules, on board its steamer Hassalo, to transport the same to Astoria, but did not transport it safely or in good condition, and did not use due or ordinary care in the handling and delivery thereof, but that upon the arrival of said steamboat at the port of Astoria, and while the animals were still in its possession, defendant wrongfully, carelessly, and negligently tied one of the mules to a small, light plow, painted red, by reason whereof said animal, although gentle and tractable, by moving its head also moved the plow, which was wholly detached, and, becoming frightened, ran away and was injured.

Two defenses are interposed. By the first it is alleged that the parties entered into a written contract concerning the shipment and transportation of the stock; that the defendant received, and, with due care and diligence, safely transported and delivered, the same, and the whole thereof, to plaintiff at Astoria, in like condition as when received, in accordance

\*See *Gardner v. Southern Ry. Co.* (N. Car.), 20 Am. & Eng. R. Cas., N. S., 82, and foot-note.

†See foot-note appended to *Southern Ry. Co. v. Jones* (Ala.), 1 R. R. 725, 24 Am. & Eng. R. Cas., N. S., 725.

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with the terms of said shipment and the conditions of said contract; that immediately upon the arrival of said stock at the port of Astoria, the plaintiff took into his possession, receipted to the defendant therefor, and paid the defendant the agreed compensation of \$15 for its carriage and delivery. The second defense is partial only, wherein it is alleged that, by the terms of the written contract, it was agreed and provided that the value of the stock did not exceed \$100 for each head, and that the recovery, if any be had, should not exceed that sum. The reply alleges that the defendant is a common carrier, as set up in the answer, and is required and enjoined by law to carry all freight and live stock that may be delivered to it safely and securely, and deliver the same, in as good condition as when received, to its owner at the termination of the shipment; that the alleged and pretended contract set forth by defendant is fraudulent and void, for the reason that at the date of its execution the regular price charged by said company for transporting horses and mules from Portland to Astoria was \$1.50 per head, which price was charged to the plaintiff, but that by the terms of the said alleged agreement it is attempted to limit the value of said stock and defendant's liability therefor, contrary to law and public policy; and for the further reason that P. Schrader signed the said agreement without having an opportunity to read it, and was compelled thereto before defendant would receive and transport said stock. It is further alleged that defendant refused to permit the plaintiff to load, or assist in loading or unloading, said animals on or off the boat, but that defendant, without authority from plaintiff, wrongfully and unlawfully, and in violation of the terms of said contract, of its own volition, loaded the horses and mules on said boat, and unloaded them off the same, and tied them on the wharf and in the warehouse of defendant at Astoria, and while in the possession of defendant, and in the unloading, the injury to said mule occurred, all without any fault of plaintiff, but by reason of the carelessness and negligence of the defendant. There was evidence tending to show that Schrader, who was acting for plaintiff, delivered the animals to the defendant at Portland for shipment to Astoria; that the deck hands put them aboard the boat; that when he arrived at Astoria he went ashore, after the boat had been there a little while; that the horses were then unloaded, and tied on the dock; that he did not know when they were taken off the boat, as he was asleep at the time, and was not notified; that no one else had charge of the stock but him; that he started to take the horses, but was notified that the freight would have to be paid before he could proceed; that he went at once to plaintiff's house near by, who was then not out of bed; that in the course of a half an hour plaintiff appeared, paid the freight, and receipted for the stock, and that as soon as this was done Schrader attempted to take four of the horses away, whereupon the



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mule, seeing the horses start, made an effort to follow them, and in doing so shifted the plow, which frightened it, and the injury ensued; and that Schrader paid his own fare to Astoria. The bill of lading signed by Schrader was offered on the part of the defense, and admitted in evidence. Upon the cause being submitted, plaintiff obtained a judgment for \$150, and the defendant appeals.

Catton, Teal & Minor and W. C. Bristol, for appellant.  
C. W. Fulton, for respondent.

WOLVERTON, J. (after stating the facts). At the threshold of the controversy, counsel for defendant insists that, as plaintiff did not declare upon the special contract entered into by the parties respecting the shipment, as evidenced by the bill of lading, he should have been denied relief because of a variance in the proof. The plaintiff has a legal right to pursue the form of action adopted (3 Enc. Pl. & Prac. 818), but having thus made his election, he must recover upon the common-law liability, or not at all, and a valid special contract of the parties, providing or stipulating for a different or restricted liability in the particular or particulars relied upon for recovery, will not, in reason and good practice, support the action. It is seldom that bills of lading showing the contractual and correlative relations and obligations of the carrier and shipper relative to the shipment are drafted with a view to changing or restricting all the common-law liabilities to which the carrier is subjected; and if any remain upon which an action may be founded and recovery had without coming in conflict with special limitations and restrictions, there exists no reason why the common-law action may not be maintained, notwithstanding the special contract. To illustrate: If there be a special restriction on account of loss occasioned by fire or by robbery, that, of itself, could not prevent a recovery upon the common-law liability in a failure to carry safely in other respects. Ordinarily, the common carrier is considered and treated as an insurer of the goods it undertakes to carry, and all limitations of common-law liabilities are in the nature of exceptions to its general undertaking; and hence, in order to avoid such liabilities, the exceptions must be pleaded. Thus it has been held in *Railway Co. v. Nicholson*, 2 Willson, Civ. Cas. Ct. App. § 168, that "in an action against a common carrier, founded on the common-law liability of such carrier, it is not necessary to produce in evidence a bill of lading of the property alleged to have been lost or injured. If there was a special contract, restricting the common-law liability of the carrier, it devolved upon the carrier to allege and prove it." To the same purpose is *Coupland v. Railroad Co.*, 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534, a case of much analogy to the present. See, also, *Tuggle v. Railway Co.*, 62 Mo. 425, and the reasoning of Mr. Justice Graves in *Railroad Co. v. Perkins*, 25 Minn. 329,

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12 Am. Rep. 275. And this is just what the defendant has done in the case at bar. It has set up that, by a special agreement, the plaintiff limited himself in his recovery to \$100. The plaintiff replied that the alleged agreement was void, as being contrary to sound public policy. If void, the defendant's common-law liability remains unchanged and unrestricted in that particular, and the special contract cannot stand in the way of plaintiff's recovery by the common-law form of action. If, however, the special agreement is found legal and binding, there is a variance fatal to that form of action, and the plaintiff must be remitted to the special contract and an action thereon. *Railroad Co. v. Remmy*, 13 Ind. 518; *Railroad Co. v. Bennett*, 89 Ind. 457; *Hall v. Pennsylvania Co.*, 90 Ind. 459; *Snow v. Railway Co.*, 109 Ind. 422, 9 N. W. 702; *White v. Railway Co.*, 2 C. B. (N. S.) 7.

It is suggested by counsel for plaintiff that, after having alleged negligence on the part of the defendant in securing the mule in the manner described, it could make no difference whether it was acting in the capacity of a common carrier or a warehouseman; it would be liable in either capacity. But the action is essentially grounded upon the failure of the company, through its negligence, to transport and deliver safely, and not upon any negligence in properly storing the property to await its reception by the shipper. The complaint proceeds upon that idea, and the reply is in reaffirmation of it. So that recovery must be had, if at all, against the defendant in its capacity as a common carrier, and not a warehouseman. This brings us to the contention of the defendant that it was relieved of liability under the complaint when the transfer of the stock was made from the boat to the wharf. There is an irreconcilable conflict in the authorities as to when the duties of a common carrier cease and those of a warehouseman begin, where freight is carried to its destination, and unloaded, and put in a place usual and convenient for its reception by the shipper. Many of the authorities hold that the shipper must have a reasonable time after the arrival and deposit thereof in which to receive and take it away; some requiring notice to the shipper also, while others relieve the carrier at once upon the safe deposit and storage at the usual place, the same being convenient for its reception by the shipper. It is not essential that we should declare at this time which of the rules is the better, or which should be adopted, as under either it is necessary that the goods should be unloaded with care, if they are to be taken from the car or boat to a place of deposit, and put in a place reasonably safe and free from liability to injury. The carrier does not, in any event, discharge itself of duty as a carrier by merely taking goods to the terminus of its route, but, as is said by Mr. Chief Justice Bigelow in *Rice v. Railroad Corp.*, 98 Mass. 212, "it is bound also to unload them with due care, and put them in a place where they will be reasonably safe and free from

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injury. Until this is done, the duty and responsibility which attach to a corporation as carriers do not close." See, also, *Thomas v. Railroad Corp.*, 10 Metc. (Mass.) 472, 43 Am. Dec. 444; *Norway Plains Co. v. Boston & M. Railroad*, 61 Am. Dec. 423; *Gregg v. Railroad Co. (Ill.)* 35 N. E. 343, 37 Am. St. Rep. 238. The carrier is required to safely carry and deliver, and, without determining which is the better rule, there is evidence sufficient to go to the jury in the case at bar whether in any event the carrier safely deposited and secured the stock upon its wharf or in its warehouse, whatever the place of deposit may be termed; that is to say, whether they were taken from the boat, and put in a place reasonably secure and free from all liability to injury, which includes, of course, the securing of the animals in a reasonable manner with reference to their safety. The company could not be said to have discharged its duty as a carrier if at the place of destination it had left the horses and mules loose, to go where they pleased, and thus permitted them to run astray or be injured, nor did it discharge its duty in that capacity until it had reasonably secured the stock after unloading it from the boat; and it was a proper question for the jury to determine whether defendant exercised reasonable care in securing the mule in controversy to a light plow, painted red, for in doing this act it was discharging a duty incumbent upon it as a common carrier. The instructions given were in harmony with this view, and hence were not subject to exceptions.

In this connection another question may be noticed. By the terms of the bill of lading, it is agreed that the shipper should load and unload the stock, and it is contended by the defendant that it was the duty of the plaintiff to have unloaded this stock from the boat, and the defendant was thereby relieved of all responsibility in respect thereof. The plaintiff answers this contention by saying that the defendant, regardless of the terms of the contract, unloaded the stock of its own accord, without giving plaintiff an opportunity to attend to the matter. There was evidence adduced tending to show that the employees of the defendant unloaded the stock in the morning before Schrader, who accompanied it, was up, and without calling him, or notifying him that it was ready to be taken from the boat. The court instructed the jury, if, notwithstanding the stipulation in the bill of lading by which the shipper was to unload the stock, the defendant undertook to discharge that duty itself, without notice to the shipper or his agent, it was liable if negligent in the performance of the act. This was a correct exposition of the law, and the instruction was proper. *Railroad Co. v. Kingsbury* (Tex. Civ. App.) 25 S. W. 322; *Railroad Co. v. Williams* (Neb.) 85 N. W. 832, 55 L. R. A. 289.

It is a sound and wholesome doctrine, based upon considerations of public policy and fair dealing, that a common carrier will not be permitted to stipulate against liability for loss

or injury of property intrusted to it for carriage and transportation occasioned by its own negligence or that of its agents and servants. In some jurisdictions such a stipulation or agreement is upheld as valid, but the very great weight of American authority is in support of the doctrine as stated. 5 Am. & Eng. Enc. Law (2d Ed.) 308. The text of this valuable edition is so strongly and abundantly supported by apt citations that it is unnecessary for us to make further references to the authorities. Nor can the carrier be permitted to stipulate or contract for a partial or limited exemption from liability occasioned by its negligence with any more reason than it may for a total exemption. We adopt the reasoning of Mr. Justice Caldwell in *Railway Co. v. Wynn*, 88 Tenn. 320, 327, 14 S. W. 311. It is palpable and cogent, and leads with irresistible power to but one result. "To our minds it is perfectly clear that the two kinds of stipulations—that providing for total, and that providing for partial, exemption from liability for the consequences of the carrier's negligence—stand upon the same ground, and must be tested by the same principles. If one can be enforced, the other can; if either be invalid, both must be held to be so; the same considerations of public policy operating in each case. With great deference for those who may differ with us, we think it entirely illogical and unreasonable to say that the carrier may not absolve itself from liability for the whole value of the property lost or destroyed through its negligence, but that it may absolve itself from responsibility for one-half, three-fourths, seven-eighths, nine-tenths, or ninety-nine hundredths of the loss so occasioned. With great unanimity the authorities say it cannot do the former. If allowed to do the latter, it may thereby substantially evade and nullify the law, which says it shall not do the former, and in that way do indirectly what it is forbidden to do directly. We hold that it can do neither." Like reasoning is employed by Mr. Justice Dickenson in *Moulton v. Railway Co.*, 31 Minn. 85, 88, 16 N. W. 497, 47 Am. Rep. 781, and the authorities are ample by which, to our minds, the doctrine is satisfactorily settled and established. *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Railroad Co. v. Simpson*, 30 Kan. 645, 2 Pac. 821, 46 Am. Rep. 104; *Black v. Transportation Co.*, 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713; *Abrams v. Railroad Co.*, 87 Wis. 485, 58 N. W. 780, 41 Am. St. Rep. 55; *Alair v. Railroad Co.*, 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588. No sort of consideration, whether it be based upon a different or lower tariff, or whatever it might be, will therefore exempt the carrier, in whole or in part, from liability attributable to his own negligence; and, where such is the essential purpose of the contract, it cannot be upheld. It must be conceded that authorities are to be found to the contrary, but many that are cited to that purpose do not so hold, and confusion has arisen through their misinterpreta-

tion, which has, no doubt, in some instances, at least, influenced such contrary holding. It is true that a common carrier's common-law liability may be limited and restricted in almost, if not in every, other particular. In this there is almost entire harmony among the authorities, and the confusion alluded to is the outgrowth of general expressions touching the limitations of liability as to the carrier, when it was not intended to convey the idea of an exemption from a liability, in whole or in part, for the loss sustained. Thus, in *Hill v. Railroad Co.*, 144 Mass. 284, 10 N. E. 836, the court uses the expression, "taking the whole agreement together, the liability of the defendant is limited by the valuation expressed in the shipping agreement"; but this case is in no sense an authority for a partial exemption. "It was substantially covered," as the court say, by *Graves v. Railroad Co.*, 137 Mass. 33, 50 Am. Rep. 282. As to the latter case, there can be no misunderstanding, as Mr. Chief Justice Morton, in announcing the opinion, directly observed that, "if we adopt the general rule that a carrier cannot thus exempt himself from responsibility, we are of opinion that it does not cover the case before us, which must be governed by other considerations. The defendant has not attempted to exempt itself from liability from the negligence of its servants. It has made no contract for the purpose." So, in the case of *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, sometimes cited as sanctioning a partial exemption, the court say: "The limitations as to value has no tendency to exempt from liability for negligence." In further illustration, see *Harvey v. Railroad Co.*, 74 Mo. 538. So that there is not so much inharmony among judicial utterances upon the subject as might be suggested by a cursory reading or consideration thereof. See *Hutch. Carr.* (2d Ed.) 250. The agreement, so far as it is material here, is as follows: "That the said company has this day received from the shipper (P. Schrader) 8 head of horses, 2 head of mules, to be transported \* \* \* at the rate of \* \* \* trf. \* \* \* per head, which is less than the tariff rate for the transportation of live stock at carrier's risk, and is given said shipper in part consideration of his agreement to the limitation of the liability said company as common carrier, as herein set forth, upon the terms and conditions following, which are accepted and agreed to by the shipper as just and reasonable. \* \* \* And it is hereby further agreed that the value of the live stock to be transported under this contract does not exceed the following mentioned sum, to wit, each horse, one hundred dollars; each mule, one hundred dollars; \* \* \* such valuation being that whereon the rate of compensation to this company for its services and risk connected with said property is based." And we are concerned with its proper construction, as a correct solution of the controversy depends upon it. It will be noted that the contract was entered into by Schrader



as shipper, and not by the plaintiff in person. But, however this may be, Schrader was the acknowledged agent of the plaintiff, and was, therefore, duly authorized to enter into such contract on his part. *Squire v. Railroad Co.*, 98 Mass. 239, 93 Am. Dec. 162; *Hill v. Railroad Co.*, 144 Mass. 284, 10 N. E. 836. If the purpose of the contract was merely to place a limit on the amount for which the defendant shall be liable,—that is to say, exempt it in any measure from full liability, as respects the value of the property concerned,—then clearly, as to any losses resulting from negligence, it cannot be upheld; and this upon the ground that it would not be just and reasonable. Quasi public functionaries are especially held to fair dealing, and when acting as public carriers, with the advantages between them, and the shipper standing very much to their side, they cannot be allowed to enter into any contract relative to the business in which they are engaged unless it is just and reasonable; and a contract exempting from liability based upon negligence cannot be so characterized. If, however, upon the other hand, the stipulation as to the value is fairly and honestly made as a basis of the carrier's charges and responsibility, it will be sanctioned as a proper and lawful contract. It is confidently asserted by high authority that there can be no difference in a case like the present one, where the stipulation is that the value does not exceed a specified sum, and one where the value is stipulated to be a given sum; and further, that it can make no difference whether the valuation expressed in the contract is one previously named by the shipper on requirement of the carrier, on one inserted in the contract by the carrier without being named by the shipper, but acquiesced in by him. In either case it becomes a part of the contract, on which the minds of the parties meet, and on which they act. Presumably, charges for transportation are measurably based upon the value of the property, and, furthermore, the measure of care on the part of the carrier will very naturally be bestowed in proportion to the value of the goods in transit. All recognize the impracticability of fixing one rate applicable to stock of different value, and it seems reasonable that for stock of ordinary worth an ordinary or average value may be fixed, and a rate for shipment arrived at accordingly, and an agreement fairly entered into upon this idea between carrier and shipper would appear to meet all the requirements of the law. So, in the case at bar, if the plaintiff freely, and without restraint,—that is, was laboring under no such inequality of conditions as that he was compelled to enter into the contract whether he would or not,—in order to have his stock carried, executed the contract in question, he is bound by the stipulations as to value. It is, in effect, a representation that the horses and mules were not worth to exceed \$100 per head, and an express assent to the rate fixed as a proper charge for transportation based upon such valuation. The plaintiff cannot

*Normile v. Oregon R. & Nav. Co.*

consistently claim a higher valuation upon the agreed rate of freight, and the contract is not, in any proper sense, one for the exemption of defendant from the consequences of negligence. In such a case the shipper is estopped to deny the value which he himself has deliberately fixed and agreed to as the real value of the property when it comes to a loss. Such stipulations and contracts are supported and upheld upon considerations of fairness, as they relate both to the shipper and the carrier. We are led to this conclusion by cases of palpable analogy and high authority. Indeed, there are but few opposed. *Hart v. Railroad Co.*, *supra*; *Alair v. Railroad Co.*, *supra*; *Railway Co. v. Sowell*, 90 Tenn. 17, 15 S. W. 837; *Starnes v. Railroad Co.*, 91 Tenn. 516, 19 N. W. 675; *Railroad Co. v. Payne*, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849; *Gregg v. Railroad Co.*, *supra*; *Hill v. Railroad Co.*, *supra*. See, also, *Abrams v. Railroad Co.*, *supra*.

The testimony shows that the plaintiff had been shipping on the steamboat line between Portland and Astoria for six years; that shortly prior to the shipment in question he endeavored, without success, to get a lower freight rate from the company; but nothing appears to have been said touching the valuation of the stock to be transported. Schrader says he did not know anything about the price of shipment or the rate at the time he took the stock to the Portland dock; that he desired it shipped at whatever the rate was; that after he took it to the dock, he saw a young man with reference to the shipment, who produced the shipping receipt, saying, "You will have to sign this," and he signed it. There was no testimony of a different tendency, and this, in brief, shows the considerations and circumstances under which the contract was entered into. There was no effort at the immediate time to obtain a different rate, nor was there any effort whatever to secure a different agreement as to values. Plaintiff knew the rate, because he had previously endeavored to obtain a lower rate, and presumably he was acquainted with the terms of shipment as to values, having been for six years a shipper by the river, and, being cognizant of these matters, directed his stock to be shipped without any endeavor or attempt to arrive at a different agreement, except as to the rate; and we can see nothing in the immediate circumstances attending the shipment and execution of the bill of lading that savors of restraint or unfairness on the part of the defendant in requiring its execution on the part of Schrader. It is not disclosed whether or not plaintiff could have obtained other terms, based upon a higher valuation of the stock, had he applied therefor, and represented that it was above the average value stated in the bill of lading, and we must presume that he could have obtained other conditions altogether reasonable; the defendant being a common carrier of live stock, as well as other property, and being in duty bound to accept and carry all stock offered on terms that are reasonable and just. From

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these considerations, it was error for the trial court to leave the question with the jury, as it did, whether there was any consideration in the way of a lower or less than the ordinary rate for a limitation of the defendant's liability for negligence as to such stock. The contract is one which the parties, so far as the record shows, could lawfully make, and there was no evidence tending to show that it was not freely and fairly executed by the parties involved. The plaintiff was, therefore, not entitled to recover upon his common-law action, having entered into a special contract relative to the utmost value of the animal injured, so that the judgment must be reversed, and the cause remanded.

## MONTGOMERY ST. RY. v. MASON.

(*Supreme Court of Alabama, April 9, 1902.*)

[32 So. Rep. 261.]

**Injury to Street Railway Passenger—Failure to Provide Safe Landing Place—Pleading.**

In an action against a street railway company for injuries received by a passenger on alighting from a car, a complaint alleging the failure of the defendant to provide a safe place for alighting is not demurrable in not averring what constitutes a safe place, nor in giving a minute description of the place where the stop was made and of the alleged injuries.

**Same—Same—Contributory Negligence—Pleading.**

A plea attempting to set up contributory negligence by alleging that "when the car stopped the lights from the car shone for ten or twelve feet on either side of the track, and that plaintiff could have seen the alleged lumber and debris before he stepped thereon, by the exercise of ordinary and reasonable care on his part," was defective in not alleging that the plaintiff failed to exercise ordinary and reasonable care or that he saw the lumber.

**Same—Same—Same—Same.**

A plea assuming that it was the duty of a passenger to inquire of a street railway company or its agent as to whether the place of stopping is a reasonably safe place for him to alight was properly overruled.

**Same—Same.\***

Plaintiff became a passenger on defendant's street railway on a dark night, and on alighting from the car at his destination tripped on taking his first step over a pile of lumber left at the place by the defendant the day previous while repairing a bridge: *held*, that the defendant was liable in failing to provide a reasonably safe place for the landing of its passengers.

**Same—Damages—Hospital Fees.**

Hospital fees for the expense of a nurse and a ward in the hospital are proper elements of damage in a personal injury action.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Action by James M. Mason against the Montgomery Street Railway. From a judgment in favor of the plaintiff, the defendant appeals. Reversed.

\*See monograph appended to *Mulhause v. Monongahela St. Ry. Co.* (Pa.), 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.

## Montgomery St. Ry. v. Mason

This was an action brought by the appellee, James M. Mason, against the appellant, the Montgomery Street Railway, to recover damages for personal injuries. The complaint contained three counts, in each of which the plaintiff claims \$5,000 damages.

The first count of the complaint, after setting up the fact that the defendant was operating a street railway in the city of Montgomery, and that the plaintiff had taken passage upon one of the cars owned and operated by the defendant, then avers that the defendant received "said plaintiff as a passenger therein, to be carried through Hull street to a certain station near Julia street and opposite to a church known as 'Hull Street Methodist Church,' at or near Jenetta Ditch, sometimes called 'Boguehomo Ditch,' *and that thereupon it then and there became and was the duty of the said defendant to use due and proper care that the said plaintiff should be carefully and securely carried and conveyed and propelled along the said railway as aforesaid* (and to have provided a proper and sufficient place, light, and means and facilities whereon and whereby the plaintiff might have safely alighted at said station opposite said church near said ditch; yet the said defendant, not regarding its duties in that behalf, did not use due and proper care in providing a proper and sufficient place, light, and means and facilities to enable plaintiff safely to alight at said station opposite said church when the said car carrying plaintiff arrived there); by means whereof the said plaintiff, while attempting to alight or descend from the said car at said station, to wit, on the 6th day of August last aforesaid and at night, stepped and fell upon certain lumber and debris which had been negligently placed and permitted to remain at the place where plaintiff alighted from said car, and, by stepping or falling upon said lumber or debris, plaintiff fell upon the same, and was thereby greatly cut, bruised, and wounded, and divers members of his body were then and there greatly injured in so much that his right arm was paralyzed, and he then and there became and was very sick, weak, and disabled for a long period, to wit, from then to the commencement of this suit, and was thereby forced to pay a large sum of money for expenses incurred, to wit, the sum of \$1,000, in and about attempting to be cured of the bruises, weakness, and injuries occasioned as aforesaid, and suffered and underwent great mental and physical pain, and was hindered and prevented and is still hindered and prevented from performing the duties of his occupation, which amounted to a large sum of money, to wit, the sum of \$5,000."

The second count of the complaint, after making the prefatory allegations as contained in the first count, then alleged that the defendant received "the said plaintiff as a passenger therein, to be carried through Hull street to a certain station near Julia street, and opposite to a church known as 'Hull Street Methodist Church,' at or near Jenetta Ditch, sometimes

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called the 'Boguehomo Ditch,' and that thereupon it then and there became and was the duty of the said defendant to use due and proper care that the said plaintiff should be carefully and securely carried and conveyed and propelled along the said railway as aforesaid (and to have provided a proper and sufficient place, light and means and facilities whereon and whereby the plaintiff might have safely alighted at said station opposite said church near said ditch; yet the said defendant, not regarding its duties in that behalf, did not use due and proper care in providing a proper and sufficient place, light, and means and facilities to enable plaintiff safely to alight at said station opposite said church when the said car carrying plaintiff arrived there), but negligently and carelessly piled the lumber and debris of an old bridge on the public highway where defendant stopped said car for plaintiff to alight, by means whereof the said plaintiff, while attempting to alight or descend from the said car at said station, or the place where said car was stopped for plaintiff to alight, to wit, on the 6th day of August last aforesaid and at night, stepped and fell upon said lumber and debris which had been negligently placed and permitted to remain at the place where plaintiff alighted from said car, and, by stepping or falling upon said lumber or debris, plaintiff fell upon the same, and was thereby greatly cut, bruised, and wounded, and divers members of his body were then and there greatly injured in so much that his right arm was paralyzed, and he then and there became and was very sick, weak, and disabled for a long period," etc.

The third count of the complaint, after making the prefatory allegations and alleging that the plaintiff had taken passage on one of the cars operated by the defendant, then continues as follows: "And that thereupon it then and there became and was the duty of the said defendant to use due and proper care that the said plaintiff should be carefully and securely carried and conveyed and propelled along the said railway as aforesaid, and to be stopped at the usual and proper place provided for passengers to alight at said station opposite said church; yet the said defendant, not regarding its duty in that behalf, did not stop said car at the usual stopping place, where plaintiff could with safety have alighted from said car, although signaled by plaintiff in ample time to do so, but carelessly and recklessly ran said car beyond said regular stopping place a distance of about 30 feet, to a place where lumber and other obstructions were lying on the ground, and where there was no light to apprise plaintiff of the situation there, and then and there stopped said car in the midst of said lumber and other obstructions, when plaintiff, believing that said car had stopped at the usual and customary place for passengers to alight at said station, while attempting to alight from said car, to wit, on the night of August 6th, 1899, stepped and fell in and upon a pile of lumber or other material, over and among which the defendant had negligently and carelessly



stopped said car, and, by stepping or falling upon said lumber or debris, plaintiff fell upon the same, and was thereby greatly cut, bruised, and wounded, and divers members of his body were then and there greatly injured in so much that his right arm was paralyzed, and he then and there became and was very sick, weak, and disabled for a long period," etc.

The defendant moved the court to strike from the first and second counts of the complaint the portions thereof which are in italics and which are in parentheses, upon the ground that said words as alleged in each of said counts were immaterial, irrelevant, and surplusage. The defendant also moved to strike from the third count of the complaint the words "carelessly and recklessly," upon the ground that said words were immaterial, irrelevant, and surplusage. The court overruled each of these motions. Thereupon the plaintiff amended the first count by striking out the portion thereof which is included within the parentheses, and inserting in lieu thereof the following allegations: "And to provide a proper and sufficient place so that plaintiff might alight safely at said station; yet the defendant, not regarding its said duty, failed to provide a proper and sufficient place for plaintiff so to alight, and stopped its car on which plaintiff was a passenger as aforesaid at a point where certain lumber and debris were lying within a few feet of its track." The plaintiff also amended the second count by striking out the words "light and means and facilities," wherever they occur. The defendant demurred to the first count of the complaint upon the following grounds: (1) Because plaintiff does not show how or in what manner the defendant failed to use due and proper care in providing a proper and sufficient place to enable plaintiff safely to alight at said station; (2) because the complaint fails to show in said count that defendant placed said lumber and debris at the place where plaintiff alighted from said car; (3) because the complaint fails to show in said count any duty upon its defendant to have removed the lumber placed along the track at the place of the accident; (4) that there was no legal duty upon defendant to have provided a proper and sufficient place whereby the plaintiff might have alighted from said car; (5) because said count fails to show that defendant knew of the location of the lumber or debris at the point where plaintiff alighted from said car, or that such lumber or debris was there sufficiently long for defendant to have been informed thereof by the use of reasonable diligence on its part. The defendant demurred to the second count upon the same grounds of demurrer as interposed to the first count and upon the following additional grounds: (1) because said count does not show that defendant did not carefully and securely carry and convey and propel the plaintiff along said railway; (2) because said count does not show how or in what respect the defendant failed to use due and proper care in providing a proper and sufficient place to allow plaintiff to alight from said

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car; (3) because the allegation in said count, "and to have provided a proper and sufficient place; whereon and whereby the plaintiff might have safely alighted at said station," is a mere conclusion of the pleader; (4) and the allegation that defendant did not use due and proper care in providing a proper and sufficient place to enable plaintiff to safely alight at said station is a mere conclusion of the pleader. To the third count the defendant demurred upon the same grounds of demurrer as interposed to the first and second counts of the complaint, and upon the following grounds: (1) Because said count does not show that there was any duty resting upon the defendant to have placed a light at the place where the plaintiff alighted from said car; (2) because said count fails to show that the defendant was in any wise responsible for the lumber or other obstruction being on the ground near its track. These demurrers were overruled. Thereupon the defendant pleaded the general issue and filed four special pleas. Plea numbered two is copied in the opinion. The remaining special pleas are as follows: "(3) The plaintiff ought not to recover of the defendant, because he was guilty of contributory negligence which proximately caused his alleged injury, in this: that he stepped from said car without knowing or inquiring of the defendant or its agent as to whether or not the situation was reasonably safe for him to alight where said car was stopped. (4) Plaintiff ought not to recover, because he was guilty of negligence which contributed proximately to the injury complained of, in that, after the car ran beyond its regular stopping place, plaintiff voluntarily alighted therefrom, without requesting the defendant or its agent to carry him back to the regular stopping place, and without ascertaining before he alighted from said car that he was alighting at a safe place. (5) The plaintiff ought not to recover, because he was guilty of negligence which contributed proximately to the injury complained of, in this: that, when he boarded and took passage on defendant's car, he did so knowing that said car was being operated without a conductor and without anybody to look after the safety of his alighting, and that he alighted from said car without first ascertaining or attempting to ascertain that he was at a safe place to alight therefrom."

The plaintiff demurred to the plea numbered 2 upon the following grounds: (1) The facts therein set forth do not constitute such negligence on the part of the plaintiff as would prevent his recovery in this suit; (2) because the stopping of the car under the circumstances of this case as set forth in the complaint was an invitation to the plaintiff to alight at that place upon which he had a right to rely and act without making inquiry. To the third plea the plaintiff demurred upon the following grounds: (1) It was not the duty of the plaintiff to make the inquiry therein referred to; (2) it shows no negligence on the part of plaintiff which proximately con-

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tributed to the injury complained of; (3) because the stopping of the car under the circumstances of this case as set forth in the complaint was an invitation to the plaintiff to alight at that place upon which he had a right to rely and act without making inquiry. The plaintiff demurred to the fourth plea upon the following grounds: (1) It assumes that it was the duty of plaintiff to inquire for information which it was the duty of the defendant to give; (2) it assumes that it was the duty of plaintiff to inquire for information in regard to possible danger which it was the duty of defendant to provide against; (3) because the stopping of the car under the circumstances of this case as set forth in the complaint was an invitation to the plaintiff to alight at that place upon which he had a right to rely and act without making inquiry. To the fifth plea the plaintiff demurred upon the following grounds: (1) It sets up no act of negligence on the part of the plaintiff that would legally relieve or release defendant from the negligence averred; (2) it assumes that it was plaintiff's duty to perform certain acts not required of him by law; (3) because it seeks to avoid one act of negligence on the part of defendant, to wit, a failure to stop at a proper place for plaintiff to alight, by showing that defendant was guilty of another act of negligence, to wit, a failure to have a conductor or other person to look after the safety of passengers alighting from said car. These demurrers were sustained, and the trial was had upon issue joined upon the plea of the general issue.

The tendency of the evidence is sufficiently shown in the opinion. Before the trial was entered upon the defendant moved the court to suppress the deposition of the witness J. H. Drake, which was taken in the cause, upon the following grounds: "Because the commission issued by the clerk of this court was issued to John K. Watkins and T. D. Samford, Esqs., of Opelika, Lee county, Alabama, appointing them commissioners jointly to take the testimony of the witness J. H. Drake, and that the deposition of the said witness was taken by John K. Watkins, acting alone, as shown by his certificate to the deposition, and because the said Watkins was unauthorized to take said testimony alone, and because said commission issued by the clerk required that T. D. Samford, Esq., Co-commissioner, be given notice of the time and place of taking the deposition. And that the certificate attached to the deposition by John K. Watkins, one of the commissioners, does not show that he gave T. D. Samford any notice of the time or place of taking the said deposition of the said witness." In support of this motion, the defendant introduced in evidence the commission issued by the clerk of the court, under which the deposition purported to have been taken. This commission showed that it was issued to John K. Watkins and T. D. Samford, Esqs., "as commissioners to take the deposition of J. H. Drake, a material witness" in said suit. The defendant also intro-

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duced in evidence the certificate of John K. Watkins to the deposition. This certificate showed that the deposition of J. H. Drake was taken by John K. Watkins alone, he describing himself as "the commissioner in said commission named." There was no evidence that Commissioner Samford did not have notice, nor any evidence tending to show why he did not act. It was shown by the evidence that the plaintiff, when he applied for the commission to take the deposition of the witness Drake, suggested John K. Watkins as a commissioner and no one else, and that the name of T. D. Samford as commissioner was inserted in the certificate by the clerk and on motion of the defendant. The court overruled the defendant's motion to suppress said deposition, and to this ruling the defendant duly excepted.

During the examination of James M. Mason, the plaintiff, he testified that he had incurred an expense of \$650 in seeking recovery from the injuries sustained by him; that the items going to make up this expense of \$650 consisted of a doctor's bill of \$160 and a hospital bill of \$159; that the hospital bill included nurse's services and in payment of a private ward which he had engaged in the Johns Hopkins Hospital. The other items of the \$650 account were for railroad fare, hotel bills, and other expenses incurred in going to and being present in the Johns Hopkins Hospital. The defendant moved the court to exclude from the jury all the testimony of the witness relative to all the items going to make up the \$650 except that portion of the testimony regarding the doctor's bill. The court excluded from the jury the testimony of the witness regarding railroad fare, hotel bills, and other items mentioned, but refused to exclude the testimony relating to the hospital bill and the doctor's bill. To the court's refusal to exclude the testimony as to the hospital bill, the defendant duly excepted.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) If the jury believe the evidence, they must find their verdict for the defendant under the first count of the complaint. (2) If the jury believe the evidence, they must find for the defendant under the second count of the complaint. (3) If the jury believe the evidence, they must find their verdict for the defendant. (4) The jury cannot find for the plaintiff unless they are reasonably satisfied from the evidence that the regular stopping place for said cars was opposite the South Hull Street Methodist Church, and that the car upon which the plaintiff was traveling did not stop in front of said church, but that the car was carried on past said regular stopping place, and stopped at a place that was not the regular stopping place for cars on that line, and that the motorman who was operating said car stopped the said car at a place where lumber and other obstructions were lying on the ground, and

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where there was no light to apprise plaintiff of the situation there; and the jury must further be reasonably satisfied, from the evidence, that the car stopped in the midst of said lumber and other obstructions, and that the plaintiff in stepping from said car stepped or fell on lumber or debris." "(10) If the jury believe from the evidence that the plaintiff alighted from said car onto the ground, and not onto lumber or debris, they must find their verdict for the defendant. (11) The court charges the jury that the undisputed evidence in this case shows that the plaintiff had ceased to be a passenger when he fell and was injured. (12) The court charges the jury that the plaintiff cannot recover anything for hospital fees. (13) The court charges the jury that unless they are reasonably satisfied, by a preponderance of the evidence, that the plaintiff received the injuries of which he complains while in the act of stepping from the car to the ground, and before he had safely alighted upon the ground, they cannot find a verdict for the plaintiff. (14) The court charges the jury that, before the plaintiff can recover in this cause, you must be reasonably satisfied by a preponderance of the evidence that he received the injuries complained of while in the act of stepping or descending from the defendant's car on the occasion testified about, and not after he had safely landed upon the ground. (15) The court charges the jury that, under the evidence in this cause, the regular stopping place or station of the defendant company on its Cloverdale line, nearest the church testified about, was, at the time of the injury complained of, on, or just beyond, the bridge at which the injury occurred. (16) The court charges the jury, if they believe the evidence in this cause, they should find a verdict for the defendant. (17) The court charges the jury that, under the evidence in this cause, the plaintiff cannot recover under the third count of the complaint. (18) The court charges the jury that, under the evidence in this cause, the plaintiff cannot recover under the second count of the complaint. (19) The court charges the jury that, under the evidence in this cause, the plaintiff cannot recover under the first count of the complaint. (20) The court charges the jury that, at the time the plaintiff sustained his alleged injuries, he was not a passenger of the defendant company."

There were verdict and judgment for the plaintiff, assessing his damages at \$2,300. The defendant moved the court to grant a new trial, and assigned as grounds therefor the several rulings of the trial court which were adverse to the defendant, and also the following grounds: (1) That the verdict was contrary to the law and the evidence; (2) that the verdict of the jury was excessive; (3) because the amount of the verdict of the jury was ascertained by casting lots in the following manner, to wit: The jury agreed that each man should write down, on a slip of paper, the amount which he thought the plaintiff should recover, and then by taking the figures on



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these twelve slips of paper, adding them together, dividing the sum by 12, taking the quotient as a result, and rendering their verdict thereon, first having agreed to be bound by the result so ascertained. In connection with this motion, the defendant introduced evidence tending to show that the last ground of the motion was based upon the actual facts relating to the manner in which the verdict was arrived at by the jury. Several of the jurors testified, and each of them stated that the verdict was arrived at in such manner. They also testified in detail as to the occurrences in the jury room while the jury was deliberating upon the verdict. The court, upon motion of the plaintiff, excluded the testimony of the several jurors as to what occurred in the jury room, and to this ruling the defendant duly excepted. The motion for a new trial was overruled, and the defendant duly excepted. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

C. H. Roquemore and Lomax, Crum & Weil, for appellant.  
George P. Harrison, for appellee.

DOWDELL, J. The appellee sued the appellant, the Montgomery Street Railway, to recover damages for injuries received by him as a passenger on one of the appellant's cars, in alighting from the car, caused by appellant's negligence. The plaintiff recovered a judgment in the court below, and from this judgment the present appeal is prosecuted.

There are numerous assignments of error, in all, 55. Some of these assignments are, however, not insisted on in argument, and such as are not insisted on will not be considered. The first 7 relates to the rulings of the court on motions of the defendant, the appellant here, to strike certain parts of the complaint as being immaterial averments and merely surplusage. After the action by the court overruling the motions to strike, the plaintiff amended the first and second counts of the complaint by striking out the words, "light and means and facilities," to which the motions to strike were in part directed. With the complaint as thus amended, no injury resulted to the defendant in overruling the motions to strike. If it be conceded that there was error, still we are unable to see that the defendant was in any way prejudiced, and, unless it affirmatively appears that the refusal of the court to strike immaterial and irrelevant averments results prejudicially, such refusal does not constitute reversible error. *Railway Co. v. Bridges*, 86 Ala. 448, 5 South. 864, 11 Am. St. Rep. 58.

The eighth, ninth, and tenth assignments of error relate to the overruling of the defendant's demurrer to the complaint, and the questions raised by these assignments that are insisted on in argument are also raised by charges requested by the defendant, and which were refused by the court. These embrace the vital points in the case, and, as they were argued together by counsel for appellant, will in like manner be con-

sidered together here. The gist of the action is in the alleged negligence of the defendant in stopping its car, upon which plaintiff was riding as a passenger, in an unsafe and dangerous place for him to disembark, so that while so disembarking or immediately upon alighting from said car, he received the injuries alleged in the complaint. The complaint in this respect sufficiently states a cause of action. It was not incumbent on the plaintiff in his pleading to aver, in connection with the duty of the defendant to provide a safe place for his alighting from the car, what should constitute a safe place, nor to undertake a minute description of the place where the stop was made and the alleged injury received. After averring the duty of the defendant to provide a safe landing place for the plaintiff in alighting from its car, the complaint in the first and second counts, with sufficient certainty and definiteness, avers the failure to perform such duty, and in a manner to constitute negligence. So, in the third count, after averring the duty of stopping the car at the usual or customary stopping place, the averment of the failure to do so and the manner and form of the breach of this duty which resulted in the injury to the plaintiff is sufficiently definite in charging negligence and the consequent damage. The complaint upon the whole states a cause of action with that degree of certainty required in pleading, and the court properly overruled the demurrer.

The second, third, fourth, and fifth pleas of the defendant, to which demurrer was sustained, sought to set up contributory negligence on the part of the plaintiff. The second plea avers, "that when the car stopped the lights from the car shone for ten or twelve feet on either side of the track, and that plaintiff could have seen the alleged lumber and debris before he stepped thereon, by the exercise of ordinary and reasonable care on his part." There is no averment in this plea that the plaintiff failed to exercise ordinary and reasonable care, or that he did see the lumber. In this respect the plea was bad. The third plea assumes that it was the duty of the plaintiff to inquire of the defendant or its agent as to whether the place of stopping was a reasonably safe place, while, on the contrary, he had a right to assume on the conduct of the defendant, as alleged in the complaint, that it was a safe place for him to alight. The fourth plea, for a similar reason, was bad. The fifth plea is nothing more than an effort to excuse one omission of duty on the part of the defendant by its omission of still another duty. For the reasons stated, these several pleas were subject to the demurrers, and there was no error in the court's action in sustaining them.

We do not understand it to be a contention on the part of the appellee, as supposed by appellant's counsel, that any duty rested on the appellant to provide, along the line of its railway, depots and stations for the convenience or safety of its passengers, as in case of steam railways, but only to pro-

vide for reasonably safe places for its passengers to get on and off its cars. It cannot be doubted that street railway companies, as common carriers of passengers for hire, are under the duty of exercising the highest degree of diligence and care in conserving the safety of their passengers, and are responsible for the slightest neglect. *Smith v. Railroad Co.*, 16 Am. & Eng. R. Cas. 310; 7 Rap. & M. Ry. Dig. p. 458, § 325. This duty arises when the relation of carrier and passenger begins, and continues until that relation is ended. These propositions of law are not disputed, but it is contended in the present case that, at the time of the injury complained of, the plaintiff was no longer a passenger on the defendant's car after alighting from the same, and that the defendant was relieved of all responsibility after the plaintiff had alighted from its car onto the ground at the place where it stopped for that purpose; and this involves the question of the duty of the carrier to provide a reasonably safe place for the landing of its passengers. The same duty of exercising the highest degree of diligence and care in the carriage or transportation of passengers in law and reason extends to and includes the safe landing of the passenger at the termination of his journey or ride, and this duty is not performed when the carrier lands its passenger at a time and place of such unknown environment to him that, in his first effort to depart after alighting onto the ground, he is tripped and thrown by an unseen pile of lumber and debris. There was evidence which tended to show that the plaintiff became a passenger at night, and, being a dark night, on one of the defendant's street cars, and paid his fare to be transported thereon; that when nearing the end of his journey he gave the usual stop signal; that in obedience to the signal the car was stopped for him to get off; that he alighted from the car onto the ground; and that at the first step he attempted to take he was tripped and thrown by unseen lumber, which had been piled at the place by the defendant the day previous while repairing a bridge over which its tracks ran, and from the fall received the alleged injuries. There was evidence which also tended to show that the customary stopping place was immediately in front of the church where the plaintiff was going to attend religious services, but on the present occasion the car passed this customary stopping place, and stopped about 30 feet beyond, and where the lumber and debris were piled by the side of its track and between the track and the church. While there was conflict in the evidence as to the presence of the lumber and debris at the place of stopping, and as to the usual and customary place of stopping in that locality for discharging passengers, we think there can be no question of the defendant's liability on the phase of the evidence above stated, if believed by the jury. This case in principle is similar to the case of *Railway Co. v. Scott*, 86 Va. 902, 11 S. E. 404, and the doctrine there laid down, and the authorities cited in support of it, are applica-

ble here. We quote from authorities cited in that case. In *Whart. Neg.* § 649, it is said: "When danger approaches, it is the duty of the officers of the road to notify passengers, so that they can take steps to avoid it; and failure to give such notice is negligence. So, also, if there is a dangerous place at the landing, it is the duty of the conductor to warn those about stepping out." "And \* \* \* he must give notice to all if any danger in alighting is probable." In *Cartwright v. Railway Co.*, 52 Mich. 606, 18 N. W. 380, 50 Am. Rep. 274, Cooley, C. J., says: "If a car in which there were passengers was not standing where it would be safe for them to alight without assistance, it was the duty of the company to provide assistance, or give warning, or move the car to a more suitable place;" citing *Railroad Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699; *Railroad Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *McGee v. Railroad Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706; *Maverick v. Railway Co.*, 36 N. Y. 378. This doctrine applies to street railway companies, and they are bound by the same liability. *Smith v. Railway Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; *Id.*, 16 Am. & Eng. R. Cas. 310, cited above; *Railway Co. v. Twiname*, 111 Ind. 589, 13 N. E. 55; *Railway Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667, 5 Am. St. Rep. 754; *Railway Co. v. Findley*, 76 Ga. 311; *Barrett v. Railway Co.*, 45 N. Y. 628; *Hill v. Railroad Co.*, 109 N. Y. 239, 16 N. E. 61.

The record does not show that the item of \$159 of hospital fees paid by the plaintiff, while under treatment for his injuries, included anything other than that of the expense of a nurse and a ward in the hospital. The court excluded the items of board and traveling expenses paid out by the plaintiff. If the attendance of a nurse was necessary while the plaintiff was under treatment for his injuries received on account of the negligence of the defendant, we cannot see why this is not as essentially an element of recoverable damage as the professional fees of the attending physician. So, too, the necessary expense of a private ward in the hospital while undergoing treatment would constitute a proper element of recoverable damage. There was no error in the action of the court in refusing to exclude the item of \$159 from the consideration of the jury in estimating plaintiff's damages.

A majority of the court are of the opinion that there was error in overruling the motion to suppress the deposition of J. H. Drake. They hold that since the commission was joint and not several, and nothing was done by defendant to waive the absence of the commissioner Samford, the execution by Watkins was invalid, and in this they follow the rule mentioned in *Douge v. Pearce*, 13 Ala. 128, and sustained by other authority, for the maintenance of which they think there are substantial reasons. The writer is of a different opinion. What was said in *Douge v. Pearce*, *supra*, was dictum. The question here presented was not before the

court for decision in that case. The depositions here were taken on interrogatories filed under section 1835, Code 1896, and that section directs what shall be done. This statute provides: "The party, after making affidavit, may file with the clerk interrogatories to be propounded to the witness, of which, and of the residence of the witness, *and of the commissioner to be appointed* [italics are mine], he must give the opposite party, or his attorney, notice in writing, who has ten days thereafter to file cross-interrogatories, to which the party filing the interrogatories may file rebutting interrogatories. After the expiration of the ten days, a commission, accompanied by a copy of the interrogatories and of the cross and rebutting interrogatories, if filed, must be issued by the clerk to take the deposition, which may be taken at such time and place as the commissioner shall appoint. On failure to give the notice herein required of the residence of the witness and the commissioner, unless the same is waived by the adverse party, the deposition of such witness must be suppressed at the cost of the party taking it." Code 1896, § 1835. I think the statute clearly contemplates that the party filing the interrogatories shall nominate the commissioner to whom the clerk shall issue the commission. As I construe the statute, he, the party filing the interrogatories, and not the clerk, is required to give the opposite party, or his attorney, notice of the commissioner to be appointed, and the last clause in the statute provides, "on failure to give the notice herein required, etc., unless the same is waived by the adverse party, the deposition of such witness must be suppressed *at the cost of the party taking it.*" It is quite clear to my mind that the duty of giving the notice required is imposed upon the party filing the interrogatories, and not upon the clerk; if the latter, why should the costs be imposed upon the party for the failure of the clerk to discharge his duty, in case the deposition is suppressed for failure to give the required notice? Again, it is not to be supposed that the clerk would be required to find out or ascertain, without the suggestion of the party filing the interrogatories, who could be procured to act as commissioner. It may be and often is the case that the deposition is to be taken at a place where the clerk is entirely unacquainted with any person. Certainly, the statute does not provide that the adverse party may suggest a commissioner, nor is there any authority expressly or impliedly given to the clerk to appoint on his suggestion. If the clerk may appoint a commissioner on the suggestion of the adverse party, and it be required that the commission shall be jointly executed, then it would be in the power of the adverse party to prevent ever obtaining the testimony of the witness on interrogatories, by the suggestion and appointment of a co-commissioner who would fail to act. I think the clerk acted without authority in appointing Samford as a co-commissioner on the suggestion of the adverse party, to act with Watkins, who was nominated by the party



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filing the interrogatories as the commissioner to be appointed. It is quite evident that the statute confers no such authority. If Watkins was in any respect an unsuitable person to act as commissioner, upon the fact being shown to the court it would be within the power of the court to control the matter. There is no pretense that Watkins was an unsuitable person, or that the commission was in any respect improperly executed by him, except that Samford did not jointly act with him. It does not appear why Samford did not act; for aught that the court knows he refused to act. I can see no good reason for saying that the execution of the commission by Watkins was not valid. The statute under consideration received a construction as to the right of the opposite party to demand notice of the time and place of taking the deposition in *Wisdom v. Reeves*, 110 Ala. 418, 18 South. 13, and what was there said seems to me in principle to support my views above expressed.

On the motion for a new trial, the court very properly excluded all the evidence by the jurors who tried the case as to the manner of their arriving at the verdict. *City of Eufaula v. Speight*, 121 Ala. 613, 25 South. 1009. This evidence being excluded, the ground of the motion based on the conduct and action of the jury in reaching a verdict was unsupported. We do not think the verdict of the jury, as to the amount of damages awarded, excessive. Other grounds of motion for a new trial, which relate to the rulings of the court on the trial, we have already treated in the foregoing opinion.

For the error pointed out, the judgment will be reversed and the cause remanded.

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GREENWICH & J. RY. CO. v. GREENWICH & S. ELECTRIC  
R. R. *et al.*

(*Court of Appeals of New York, Nov. 18, 1902.*)

[65 N. E. Rep. 278.]

**Railroads—Extension—Powers.**

Laws 1890, c. 565, provide that every railroad corporation, except elevated roads, may alter any part of its route, or locate it or any part thereof in a county adjoining any county named in its certificate of incorporation, if the directors believe that the line can be improved thereby, on making and filing a survey and map of such change: *held* not to permit a railroad to select a new terminus in an adjoining county, seven miles from its original terminus, and extend its line thereto, where such change is only made for the purpose of increasing the business of the road, and not for the purpose of benefiting the line originally located by the articles of association.

O'Brien, Haight, and Martin, JJ., dissenting.

Appeal from supreme court, appellate division, Third department.

Proceedings by the Greenwich & Johnsonville Railway Company against the Greenwich & Schuylerville Electric

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Railroad and others to condemn land. From an order of the appellate division (78 N. Y. Supp. 24) affirming an order of the special term, dismissing the petition, plaintiff appeals. Affirmed.

In this proceeding the plaintiff seeks to condemn certain lands for its use. It appears from its petition that it is engaged in the operation of a steam railroad between Johnsonville, Rensselaer county, and Greenwich, Washington county, N. Y., and that it is the successor, through foreclosure and reorganization proceedings in 1879, of the Union Village & Johnsonville Railroad, a corporation organized in 1866. It alleges that "in pursuance of the railroad law, paragraph 13, your petitioner, by a vote of two-thirds of all of its directors, has altered and changed its route and terminus, by extending its route from its present terminus in the village of Greenwich, Washington county, New York, through the towns of Greenwich and Easton, in Washington county, N. Y., to Schuylerville, in Saratoga county, N. Y., which is a county adjoining Washington county, and the certificate of such alteration and change, as required by statute, has been duly made and entered" in the appropriate county clerks' offices. The making and filing of survey and map, showing the alteration and change as proposed, are alleged, and it is stated "that the plaintiff's line will be improved by such change of route and terminus, and a number of mills and a large quantity of freight will be reached by this extension." Allegations follow to the effect that the lands described in the petition are in the "line of the survey of such extension, and are necessary to the plaintiff to make such extension" for the location of its tracks, the operation of its steam railroad from Greenwich to Schuylerville, and "to serve the public as a common carrier." There are other allegations relating to matters proper to be stated, and describing the acts done by the plaintiff to entitle it to begin the proceeding. The Greenwich & Schuylerville Electric Railroad is defendant, and claims to be the owner of the lands which are sought to be condemned. It was organized, under the laws of this state, for the purpose of constructing a street surface railroad from the village of Greenwich, Washington county, N. Y., to the village of Schuylerville, Saratoga county, N. Y. The answer to the petition in its behalf is made by the Hudson Valley Railway Company, its successor through consolidations. The answer alleges that the petition does not state facts sufficient to authorize the plaintiff to maintain the proceeding to acquire title to the lands described, and contains a denial of all its material allegations. It alleges that the lands owned by it in the town of Greenwich are held in trust for the public use, and are actually used by it for depots and gravel beds, and that the consents of the trustees of the village of Greenwich, of the town board of the town of Greenwich, and of a majority of the taxpayers in said village and town had not been pro-

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cured. The issues were referred to a referee to hear and determine, who reported, with findings of facts, that the plaintiff was not entitled to institute the proceeding; and he directed judgment dismissing the same. Upon appeal to the appellate division, in the Third judicial department, the judgment appealed from was affirmed by an order, which stated as follows: "A majority of the court determining that the conclusions of fact are unsupported by the evidence and should be reversed, and that, as matter of law, the petitioner is not entitled to the relief asked for, now \* \* \* ordered, that the judgment, etc., is affirmed." The plaintiff now appeals from the order of the appellate division to this court.

C. C. Van Kirk, for appellant.

Thomas O'Connor, for respondents.

GRAY, J. (after stating the facts). As this case comes before us, it is manifest that, with the reversal of the judgment, so far as it rested upon the facts, the question of law remains whether, upon the allegations of the petition, power has been conferred by the statute to accomplish the purpose sought and stated therein. It appears in the petition, and it is the plain and undisputed fact, that what is proposed by the petitioner, as an alteration or change of its route and of its present terminus in the village of Greenwich, is to extend that route from that terminus and village to the village of Schuylerville, in the adjoining county of Saratoga, a distance of some seven miles. Authority to do this is claimed to be found in section 13 of the railroad law (Laws 1890, c. 565, as amended). That section, which is entitled "Change of route, grade or terminus," provides as follows: "Every railroad corporation, except elevated railway corporations, may, by a vote of two-thirds of all its directors, alter or change the route or any part of the route of its road or its termini, or locate such route, or any part thereof, or its termini, in a county adjoining any county named in its certificate of incorporation, if it shall appear to them that the line can be improved thereby, upon making and filing in the clerk's office of the proper county a survey, map and certificate of such alteration or change," etc. The language of the section, upon its face, seems to carry a rather broad grant of power, and appears to afford some support to the argument of the plaintiff. It is argued that, where the corporate purpose is to change the terminus, there must be an extension of route; for the only possible way to do so is by going beyond the existing terminus and locating the line, as, otherwise, it would be contravening a clause of section 13, which provides that "no portion of the track of any railroad \* \* \* shall be abandoned under this section." The trouble or difficulty with the language of this section is in its indefiniteness in the respect claimed. Conceding, as I think we should, the propriety of giving to the statute as liberal a construction as the broadness of its

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apparent grant of power warrants, it nevertheless must be borne in mind that, in a case where it is sought under cover of its authority to take private property in invitum the owner, that authority must be seen to apply exactly to the case stated. In this case we have a railroad corporation whose route or line of road was located between termini fixed by the charter at the village of Johnsonville, in Rensselaer county, and the village of Greenwich, in Washington county. It has been engaged in the operation of its railroad upon that route since 1879. Its avowed purpose, as stated in its petition, is to extend its route from its present terminus in the village of Greenwich to a village in the adjoining county of Saratoga. Does the language of section 13, when fairly construed with reference to public policy as well as to the intent of the statute, confer authority to construct an extension of the route, so as to create a new line of railroad, enabling thereby the company to reach some distant point and to cover new territory for its business operations? I think not. The section, in providing for an alteration or change of the route or of any part of the route of its road, or for the location of such route or any part thereof in an adjoining county, in my opinion, has reference to the route as fixed originally by the corporate charter, and this view finds support in the language, following upon the grant of power, viz.: "if it shall appear to them [the directors] that the line can be improved thereby." The change or alteration of route contemplated must be one affecting the line of road as laid out. For reasons bearing upon the convenience or facility of operating the road and of the hauling of its trains, or a better service for the public along the line of the railroad, lateral changes or alterations might be authorized. The power to change the termini, or to locate them in adjoining counties, should be allowed a reasonable operation; not one which would permit what actually will be the construction of a new line of railroad in extension of the existing route. The plaintiff's line had been once located between terminal points, and if, upon the plea of a change of terminus or route, it may extend its line seven miles further and reach another town, its power must be regarded as only restricted by the territorial limits of the counties adjoining each terminus, and indefinite extensions within that area were possible. That in the change of a terminus to an adjoining county some new road will have to be constructed, and therefore that there is implied, pro tanto, the power to construct some extension, may be true; but the reasonable construction which the language of the statute should receive, and considerations of public policy, require that the right to change a terminus should be limited to such other location thereof as will subserve the operation of the existing road and its particular convenience in the transportation of passengers and of freight as an existing route. Precise or literal interpretation of a statute is not to be given where it is open to

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construction, and where to do so would unduly enlarge the grant of power and militate against a state policy.

I agree with the view expressed in the opinion of the appellate division, which, in considering the change as proposed in the petition to be unauthorized by the statute, holds that the change or improvement contemplated must be one for the purpose of benefiting the line located by the articles of association, and must have reference to some feature of the line itself, such as an easier grade, or a lessened cost of construction and maintenance; not the mere reaching out into another territory for the purpose of increasing the business of the road. A public policy with respect to the construction of new railroads is declared in section 59 of the railroad law; though, of course, by its terms, it is to apply only to railroad corporations thereafter formed. It is now required that the board of railroad commissioners shall certify that public convenience and a necessity require the construction of a proposed railroad.

The case of Railroad Co. v. Steward, 170 N. Y. 172, 63 N. E. 118, is not an authority in support of the plaintiff's claim. In that case the plaintiff sought to condemn to its uses lands in the village of Goshen, for the purpose of traversing the village with other tracks upon a different alignment. Its purpose was to retain its existing main line, and to construct between two points, in a long curve upon the main line, two additional tracks, for greater facility in moving its freight trains; which purpose, if accomplished, would subserve a plan of completing a system of four tracks upon its New York division. The plaintiff's proceeding there was rested upon the power conferred in the provisions of subdivision 2 of section 4, subdivision 3 of section 7, and section 13 of the railroad law. None of these was deemed to confer the requisite power; and with respect to section 13, which alone has any reference to the present case, it was held that the approval of the village trustees must first be obtained before the corporation could proceed to condemn the lands. We considered that, when the company had once located its line of road between terminal points, pursuant to its charter, it was concluded by that location, and no change of its route could thereafter be made, in the absence of some legislative authority. In the discussion of the powers conferred by section 13, while holding that they existed for the purpose of altering or changing any part of a route, the reference was obviously to the route between the terminal points as they had been located. Such an alteration or change of route when within a city or a village required for its authority that the approval of their proper authorities should be first obtained. The question in that case was, as it presents itself to us in the present case, whether the exercise of the power of eminent domain, to take the land in question for the purposes avowed, had been delegated by the legislature through the railroad law.



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Our view of the statute under which the plaintiff claims the right to proceed is that the avowed purpose of the proceeding is not authorized by any reasonable construction of its provisions, and that it would contravene the policy of the state to allow a railroad corporation, proceeding under the grant of power to change or to locate its route or terminus in an adjoining county, to extend its line of road in the manner contemplated here. Such a change must be within reasonable limits, and such as may be seen to be an actual improvement of the existing line, in affording to it greater conveniences or greater facilities in its operation and management.

For these reasons, I advise the affirmance of the order appealed from, with costs.

O'BRIEN, J. (dissenting). I think the order appealed from should be reversed. The petitioner asked nothing that is not plainly allowed by the statute. Section 13 of the general railroad law permits and provides as follows: "Every railroad \* \* \* may, by a vote of two-thirds of all its directors, alter or change the route or any part of the route of its road or its termini or locate such route, or any part thereof, or its termini, in a county adjoining any county named in its certificate of incorporation, if it shall appear to them that the line can be improved thereby, upon making and filing in the clerk's office of the proper county a survey, map and certificate of such alteration or change." This language is so clear that it would seem to be impossible to mistake its meaning. It is not open to construction. The petitioner seeks to change its terminus at Greenwich, in Washington county, to Schuylerville, in the adjoining county of Saratoga, by extending the road to the latter place, a distance of about seven miles. The directors, by the necessary two-thirds vote, have resolved to make the change in order to improve the line or route. The statute has been literally complied with in every respect, and the only question involved in the case is one of law, and that is whether the statute authorizes a railroad to change its terminus in one county to a point seven miles distant in an adjoining county. If the statute does not permit this to be done, then it may be asked what does it mean when it says in every plain language that a railroad may change its termini and locate it in an adjoining county?

The only argument against the right of the petitioner to the relief sought to be obtained in this proceeding is that it may, if the statute is given effect according to the plain words employed, so extend its railroad as to make the route longer than it was before by seven miles. Certainly the termini of a railroad cannot be changed to an adjoining county very well without making the route longer or shorter. It is said that the extension, if any, must be a reasonable one. But the legislature has not placed any such limitation upon the statute, since in plain words it authorized the change to a point in an adjoining county; and, if the court is to emasculate

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late the statute in that way, how can it say that a change involving an extension of seven miles is not reasonable?

It is said that if the plain language of the statute is to be given effect, and the extension of seven miles is to be permitted, then the petitioner may by successive extensions into an adjoining county indefinitely extend the length of its railroad. The answer to that suggestion is very obvious and very reasonable. When the petitioner extends its line to Schuylerville, it has exercised all the power that the statute confers, and the right to enter an adjoining county is exhausted, and cannot be repeated by going into a third or fourth county. The right to change the terminus to an adjoining county does not carry with it the right to keep changing from one county to another indefinitely. That would be an abuse of the power conferred, since the power to change the terminus to an adjoining county does not confer or fairly imply the right to repeat the change from time to time, and thus enable a railroad to extend itself all over the state from county to county without other limitation. We ought not to nullify a plain statute from fear that it may be abused, when such abuse can be prevented by a reasonable and obvious limitation, such as is here suggested.

This court, of course, has nothing to do with the question whether the proposed change will improve the line or not. That question was for the directors to decide, and they have decided it, and it is not open to this court to hold that they were wrong in so deciding a question of business in which they were concerned as trustees of the stockholders. This court is concerned only with the question of statutory power, and the statute is plain.

In a very recent case a railroad attempted to do practically what the petitioner seeks to do in this case, and we held that it could be done under section 13. The only obstacle found in the way of the moving party in the case was that it had not complied with that provision of the section which required the consent of the village trustees. *Railroad Co. v. Steward*, 170 N. Y. 172, 63 N. E. 118. It is significant that by the terms of section 13 a railroad is forbidden to abandon any part of its old track, and hence, if there can be a change of termini at all, it must be accomplished by extending, and not contracting, the length of the original line of railroads. It seems to us that the statute in plain terms permits the railroad in this case to change its terminus from Greenwich to Schuylerville, and that is all that it asked; and so the order should be reversed, and the application granted.

PARKER, C. J., and BARTLETT and VANN, JJ., concur with GRAY, J. HAIGHT and MARTIN, JJ., concur with O'BRIEN, J.

Order affirmed.

**MINNICH v. LANCASTER & L. ELECTRIC RY. CO. et al.***(Supreme Court of Pennsylvania, Oct. 13, 1902.)*

[53 Atl. Rep. 501.]

**Joint Tort Feasors—Action—Dismissal as to One.**

Plaintiff sued two street railway companies and a construction company to recover damages for the construction of a street railway on a highway on which his land abutted, without his consent, alleging injuries to his crops and fences, and injuries from the reckless manner of operating the cars. It appeared that one of the street railway companies had leased its franchises and property to the other, which was alone responsible for the negligent operation of the road; that the construction company alone was responsible for the destruction of the crops and fences, and that the construction company and the other street railway company were liable for the construction of the road without plaintiff's consent: *held*, that a nonsuit could be entered as to the defendant not connected with the joint tort, or a verdict directed for him, and the case submitted to the jury, as to the other two.

Appeal from court of common pleas, Lancaster county; Landis, Judge.

Action by Zacharias Minnich against the Lancaster & Lititz Electric Railway Company and others. From an order refusing to take off a nonsuit, plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, MESTREZAT, and POTTER, JJ.

L. N. Spencer and H. M. North, for appellant.

W. U. Hensel and Coyle & Keller, for appellee.

FELL, J. The error in practice corrected by the decisions in *Howard v. Traction Co.*, 195 Pa. 391, 45 Atl. 1076, and *Dutton v. Lansdowne Borough*, 198 Pa. 563, 48 Atl. 494, 53 L. R. A. 469, 82 Am. St. Rep. 814, was that of joining two or more defendants between whom there had been no concert of action, and under the allegation of a joint tort proving the separate torts of each defendant, and leaving the court or jury to select the party legally responsible. This left the case of the defendant against whom a cause of action was shown prejudiced by the proof of the wrongful action of others with whom he had no connection. Referring to these decisions in *Wiest v. Traction Co.*, 200 Pa. 148, 49 Atl. 891, it was said by our Brother Potter: "Joining several parties as defendants without regard to the question of the tort being joint does, no doubt, relieve the plaintiff of the responsibility of finding out, before bringing his action, who is justly chargeable with the wrong causing the injury, as it leaves that question to be developed at the trial. The plaintiff may profit by the contention which naturally arises among the defendants, in which each seeks to charge the other. But such a course does not tend to an orderly trial nor the attainment of justice. \* \* \* We are aware that it is thought that the effect of a misjoinder may be cured by taking a verdict against one defendant only, and authority is not lacking to support this view. But

this remedy is not adequate. The mischief in unwarrantably joining as defendants parties who are not in fact joint wrongdoers, is in the confusion and disorder resulting at the trial, and the increased difficulty in arriving at a just verdict. It is not necessary to sue all the parties guilty of committing a tort, for joint wrongdoers are liable jointly and severally. And where a joint suit is brought against a number of defendants, if the evidence shows that one of the parties was not connected with the tort, a verdict or nonsuit as to him is proper. A joint verdict may then be rendered against such of the defendants as are jointly liable." We have quoted at length from this opinion in order that its scope and effect should not be misunderstood. The point decided in these three cases was that, where a joint tort is alleged, it must be proved, and that, if the proof is only of a tort by one defendant, or of separate torts by different defendants, the action cannot be sustained against any of them. In such cases the plaintiff may amend his declaration, and proceed against the party liable under the proofs adduced, subject to the defendant's right to a continuance, as has been pointed out in the recent case of *Rowland v. City of Philadelphia*, 202 Pa. 50, 51 Atl. 589.

The facts developed at the trial were these: One of the defendants—the Lancaster & Lititz Railway Company—was authorized by its charter to construct and operate an electric railway about seven miles in length. On the day its charter was obtained it leased its property and franchises to the Pennsylvania Traction Company, another defendant, for 999 years. The traction company contracted with an individual for the building of the road, and he, with the knowledge and approval of the company, sublet the contract to the third defendant, the Lancaster Railway Construction Company, by whom the road was built. The consent of the plaintiff to the location of the railway on the public road on which his farms abutted was not obtained. The grounds of his complaint were that the railway was built on the public highway in front of his property without his consent; that in building the road his land was entered upon, soil and rocks removed therefrom, and his crops and fences injured; and that the cars are operated in such a reckless manner as to render ingress and egress to and from his farms in all places inconvenient and dangerous, and in some places impossible. The learned judge was of opinion—and, we think, rightly—that nothing had been shown to make the railway company responsible. It had lawfully procured and lawfully leased its franchises, and it was not liable for the failure of its lessee to obtain the consent of the plaintiff to the location of the road in front of his farms. He also held that for the invasion of the plaintiff's private property and the destruction of his crops and fences the construction company alone was responsible; for the negligent operation of the road the traction company alone was

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responsible; but that for the unlawful construction of the road without the plaintiff's consent both the construction company and the traction company were liable, on the ground that one who procures an unlawful act to be done is equally guilty with one who commits it. In brief, against one of the defendants, nothing was shown. As to the other two, it was shown that each had committed a separate tort, and that together they had committed a joint tort. On the ground that a joint tort had not been committed by all three of the defendants, a nonsuit was entered. This was error. The cases of *Howard v. Traction Co.* and *Dutton v. Lansdowne Borough*, supra, are authority only for the proposition that, where a joint tort is alleged, it must be proved, and that in such a case the proof of separate torts will not warrant a recovery against any of the defendants. In this case a joint tort was alleged and proved as to two defendants, but not as to all. As to the defendant not connected with the joint tort, a nonsuit might have been entered, or a peremptory direction given the jury, and the case submitted as to the other two. This would have been in accordance with the rule on the subject as stated in the opinion in *Wiest v. Traction Co.*, 200 Pa. 148, 49 Atl. 891, that, "where a joint suit is brought against a number of defendants, if the evidence shows that one of the parties was not connected with the tort, a verdict or nonsuit as to him is proper. A joint verdict may then be rendered against such of the defendants as are jointly liable." The mistake in admitting irrelevant testimony as to separate torts could have been remedied by striking it out, or instructing the jury to disregard it. If its admission had done harm by prejudicing the case, there would have been ground for a continuance.

The judgment is reversed, with a procedendo.

MANSON *et al.* v. SOUTH BOUND R. Co. *et al.*

(*Supreme Court of South Carolina, April 25, 1902.*)

[41 S. E. Rep. 832.]

Injunction—Use of Park for Railroad Station.\*

Residents of a city, whose interest in a public park differs only in degree from that of the other residents of the city, and whose property does not abut on the park, cannot sue to enjoin its condemnation for a railroad station.

Appeal from common pleas circuit court of Richland county; Gary, Judge.

Action by Charles H. Manson and another against the South Bound Railroad Company and the city of Columbia. Judgment for plaintiff, and defendants appeal. Reversed.

The following is the circuit decree:

"This case came before me for hearing on the pleadings,

\*See *Philadelphia v. McManes* (Pa.), 3 Am. & Eng. R. Cas., N. S., 652.



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report of the master, with the testimony taken by him and exceptions thereto by the attorney for the South Bound Railroad Co., defendant. The land described in the complaint as 'Sidney Park' was acquired by the city of Columbia in 1835. The city of Columbia established its waterworks in the lower part of this property, and used so much of it as was necessary for that purpose until about 1855 or 1857, at which time new springs were purchased, and the waterworks removed to Richland and Williams streets, where they remained until removed to the river in the early seventies, at which latter place they are now maintained. After the removal of the waterworks from the park, the water from the springs therein was conveyed by pipes to a reservoir outside of the park, used only as a supplementary supply to the river water. Before that time, however, to wit, about 1851 or 1852, the city council of Columbia, upon the suggestion of one of its members, Mr. Algernon Sidney Johnson, appropriated all of this property not needed exclusively for its water supply purposes to the use of the citizens of Columbia as a public park. The city, at its expense, improved and adorned the property, laid out walks and drives, erected fountains and arbors, planted trees, shrubberies, flowers, and grass, built a driveway around it, and held it out to the public as a public park, maintained a park keeper, regulated it by special ordinances, and placed a sign over its gate, and published maps prepared by the city engineers upon which it was designated as 'Sidney Park'; and it continued to be thus maintained and held out without interruption and without question until the commencement of this action. During this period the plaintiffs, Manson and Robertson, purchased their property, the value of which was enhanced by reason of its situation on the park.

"Lands in or near a city, condemned by the state under its power of eminent domain, or by a city under the same power delegated to it by the state, or property belonging to a city appropriated by it for the purposes of a public park, or conveyed by an individual to a city for such purposes and accepted by the city, thereby becomes a park, which, as such, is devoted to public use. The park in this case, Sidney Park, had so been devoted to a public use by the city of Columbia for more than forty years, and thereby the citizens of Columbia acquired a right to its continued use at a park until taken away by the state under its power of eminent domain. 2 Dill. Mun. Corp. 635, 636, 644, 645, 648, 664a, and note, 637, 642; 9 Am. & Eng. Enc. Law (2d Ed.) 23, 25, 61, 76; *City of Chicago v. Ward*, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Rep. 185; *Board of Sup'rs of Frederick County v. City of Winchester*, 84 Va. 467, 4 S. E. 844; *Story v. Railroad Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *U. S. v. Illinois Cent. R. Co.*, 154 U. S. 238, 14 Sup. Ct. 1015, 38 L. Ed. 971; *Davenport v. Buffington*, 38 C. C. A. 453, 97 Fed. 234, 46 L. R. A. 380. But property held by a city as a

public park for the use of all its citizens cannot be taken for any other public use without express legislative authority. A railroad is a public use, but it cannot condemn property without legislative authority; and it cannot condemn for its uses property which has already been appropriated to some other public use, unless there be express authority from the legislature to condemn that piece of property, or all property devoted to like public uses, or unless the authority to take such property is a necessary implication from the terms of the charter, without which the power to build the road would fail. The authorities on this point seem to be in full accord, and fully sustain this position. Lewis, Em. Dom. (2d Ed.) 175, 267, 267b, 269, 272, 276, and note 64 on page 632; 3 Elliott, R. R. 1104; 10 Am. & Eng. Enc. Law (2d Ed.) 1093, 1095, 1100, 1110; 2 Dill. Mun. Corp. 597, 600; City of St. Paul v. Chicago, M. & St. P. Ry. Co. (Minn.) 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 188; Prospect Park v. Williamson, 91 N. Y. 552, 558, 14 Am. & Eng. R. Cas. 34; Douglass v. City Council (Ala.) 24 South. 745, 43 L. R. A. 376; Davenport v. Buffington, 38 C. C. A. 453, 97 Fed. 234, 46 L. R. A. 377.

"Upon reference to the charter and amendatory charters of the defendant company, we find that they are given authority to build a railroad from a point within or near the limits of the city of Columbia to a point on the Savannah river, and to extend that road from the point within or near the limits of the city of Columbia to the northern boundary line between this state and North Carolina, and in the construction of such railroad to conduct it across or along any road or water course, and to condemn rights of way under the general laws of 1868. This act of 1868 is substantially the same as that now found in 1 Rev. St. 1893, § 1743 et seq., authorizing lands to be condemned for railroad tracks, depots, etc., and gives the right of way over another right of way if not a hindrance to the use and enjoyment of the first, which proviso is also specifically stated in section 12 of the original charter; but in no act of the legislature is there any authority, special or general, which authorizes the South Bound Railroad Company to condemn for its use lands then in public use as a public park. It cannot be successfully contended that the right to build a railroad from a point within or near the city of Columbia to the North Carolina line gives the power by necessary implication to appropriate for its purposes this public park. See illustrations in note 64, of 2 Lewis, Em. Dom., supra. The general law providing for the manner of acquiring rights of way is held by our supreme court in Ross v. Railway Co., 33 S. C. 477, 12 S. E. 101, to provide only for the manner of obtaining compensation for the taking of the right of way, the right to take under the power of eminent domain being conferred by the charter. I therefore hold that the South Bound Railroad Company, with or without the

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sanction of the city council of Columbia, had no authority to condemn Sidney Park for either right of way or station purposes.

"This case was instituted by the five plaintiffs named in the complaint, in behalf of themselves and all other citizens of Columbia who might come in and join them. The only plaintiffs now prosecuting this case before me are C. H. Manson and E. W. Robertson. Have these plaintiffs, Manson and Robertson, a right to maintain this action? It seems to me that they have. There is no evidence before me to show that there are any other dwellings overlooking this park. The residence owned by the plaintiff Manson is separated from the park only by a street or road of about 60 feet in width, which from the testimony seems to have been constructed as a part of the park. The residence of the plaintiff Robertson, while separated from the park by this same road, also has intervening the width of Laurel street and a small triangular lot of open ground belonging to the city; but both houses seem to have the location upon bluffs that overlook this park, and the value of their property, as shown by the uncontradicted testimony, will by reason of their location be specially and peculiarly injured by the destruction of this park and its conversion into a railroad station, which is an injury peculiar to them and differing in kind from the injury to other citizens whose property is not so located. 2 Lewis, Em. Dom. 636a, 645b; *Railway Co. v. Ridlehuber*, 38 S. C. 308, 17 S. E. 24; *Wilkins v. Town Council*, 54 S. C. 199, 32 S. E. 299; *Douglass v. City Council (Ala.)* 24 South. 745, 43 L. R. A. 376; *Davenport v. Buffington*, 38 C. C. A. 453, 97 Fed. 234, 46 L. R. A. 377; *South Carolina Steamboat Co. v. South Carolina R. Co.*, 30 S. C. 545, 546, 9 S. E. 650, 4 L. R. A. 209, 14 Am. St. Rep. 923; *Same v. Wilmington, C. & A. R. Co.*, 46 S. C. 327, 24 S. E. 337, 33 L. R. A. 541, 57 Am. St. Rep. 688; *Crouch v. Railway Co.*, 21 S. C. 495, 29 Am. & Eng. R. Cas. 495. And the same applies in cases of injunction. See *High*, Inj. 522, 528. At the time of the commencement of this action the park had not been touched. Condemnation proceedings had been commenced, but not completed. Now the park has been, as such, entirely destroyed, the railroad is in full possession, and it would be impossible for the defendant to restore the park to its then condition. The complaint asks for an injunction not only against the condemnation of the property, but also against its use for railroad purposes. I am satisfied that the damages sustained by the plaintiffs are such that they may be compensated in money, and therefore, under the circumstances now existing, the injunction prayed for will be refused. 2 Lewis, Em. Dom. 645a. Nevertheless, the plaintiffs had a good cause of action for injunction when this action was instituted, and it is through no fault of theirs that the court will not now grant them this injunction. In such cases, there being no

claim for vindictive damages, a reference should be ordered to the master to ascertain the amount of damages sustained by these plaintiffs by reason of the acts done by the defendant without authority of law. *Kerr*, Inj. 231; *Case v. Minot*, 158 Mass. 588, 33 N. E. 702, 22 L. R. A. 536; *Bird v. Railroad Co.*, 8 Rich. Eq. 54, 64 Am. Dec. 739; *Busby v. Mitchell*, 29 S. C. 451, 7 S. E. 618; *Bouland v. Carpin*, 27 S. C. 365, 3 S. E. 219; 2 *Lewis*, Em. Dom. 645a; *Paper Co. v. Langley*, 23 S. C. 145.

"It is therefore ordered that it be referred to the master of Richland county to ascertain and report the amount of damage sustained by the plaintiffs, C. H. Manson and E. W. Robertson, by reason of the destruction of Sidney Park by the defendant company and its use thereof as a railroad station. It is further ordered that the defendant's exceptions be overruled, and that the findings of the master be confirmed."

From this decree the defendant, South Bound Railroad Company, appealed.

Wm. H. Lyles and P. H. Nelson, for appellant.

Allen J. Green, Robt. W. Shand, and Andrew Crawford, for appellees.

GARY, A. J. (after stating the facts). The appeal herein is from a decree of his honor, the circuit judge, which will be set out in the report of the case.

The first question that will be considered is whether the plaintiffs, under the facts of the case, have the right to invoke the aid of the court in the exercise of its chancery powers. The master to whom the issues of fact were referred made his report, in which he found the following facts: "(6) That the plaintiff E. W. Robertson is now, and was before the commencement of this action, a resident and taxpayer of the city of Columbia, and the owner of two acres of land situate at the corner of Assembly and Laurel streets, on the top of Haskell's or Taylor's Hill. That the said premises are separated from the park by Laurel street and by a triangular lot of land bounded by Laurel and Assembly streets, and is distant three or four hundred feet from the park, and 'overhangs' the park, with an unobstructed view thereof; and its situation with reference to the park as it stood at the time of the commencement of this action materially enhanced its value, and the same were purchased by Judge Haskell, its former owner, and E. W. Robertson, one of the plaintiffs herein, with reference to the park, opened and maintained and labeled with a sign placed over its gates by the city as a public park; and prior to the commencement of this action, while in that condition, the said plaintiff had commenced the erection of a residence on his said premises, and had expended large sums of money (\$12,000) for plans and materials in building the same, which said premises as a residence will be materially injured by the establishment of a railroad station in the park. (7) That from

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the conformation of the ground, the house being on the top of the hill and the park in the valley, the house overhangs the park, and is peculiarly susceptible to the damage that would be caused by smoke, soot, dust, and noise inseparable from a railroad yard and freight and passenger station. (8) That the plaintiff C. H. Manson was at the time of the commencement of this action, and is now, a resident and taxpayer of the city of Columbia, and the owner of a residence at the corner of Gates and Laurel streets, abutting on the Palmetto road, which is the public road laid around the park; which said house is about sixty feet from said park inclosure, and overlooks the park, and has an unobstructed view of and over the same, and was purchased by the said plaintiff with reference to the said park, and while the same was opened and maintained and labeled by a sign placed over its gates by the city as a public park." It will thus be seen that neither E. W. Robertson nor C. H. Manson was an abutting landowner on the land designed as a park, nor that they have sustained injuries different in kind from those which might reasonably be expected would be suffered by those in the neighborhood, although differing in degree.

The question under consideration is so conclusively settled by the case of *Cherry v. City of Rock Hill*, 48 S. C. 553, 26 S. E. 798, that the court might with propriety rest its decision on that authority. We will, however, cite others. The rule in such cases is thus stated in *Hightower*, 101 N. J. 1298, 1301: "Sec. 1298. The question of the degree of interest in the subject-matter which is requisite to render one a proper party plaintiff to institute an action for the purpose of restraining misconduct on the part of municipal corporations or their officers is one of much practical importance and deserving of special attention. In general, it may be said that, to warrant the interference of equity in this class of cases, the aggrieved party must show that some special and peculiar injury, personal to himself, is likely to result from the act complained of, aside from the general injury to the public. And while some conflict of authority exists as to what constitutes such special injury as will warrant a court of equity in interfering, the better doctrine is that taxpayers of a municipal corporation, as a city or county, whose burdens of taxation are increased by the misappropriation of public funds by municipal officers, or by other official misconduct on the part of such officers, sustain such special damage as to entitle them to relief. Thus, the enforcement of a city ordinance which is unconstitutional and void, and which seeks to impose a debt upon the city, may be enjoined by property owners and taxpayers of the city. So, where a board of county commissioners are proceeding without authority of law to appropriate county funds in aid of the construction of a railway, a taxpayer of the county has such an interest in the public funds as enables him to maintain a bill for an injunction. And since



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the municipal government of a city or town is intrusted with the control and disposition of municipal affairs for the benefit and protection of its citizens and taxpayers, they are the proper parties to a bill for an injunction against the improper exercise of a municipal authority."

"Sec. 1301. Although the general doctrine that taxpayers are proper parties to invoke equitable relief against misconduct upon the part of municipal authorities is thus seen to be well established, it is not to be understood that they are entitled to maintain an action in all cases of this nature, regardless of their personal interest, or of the degree of injury which they may sustain. And where, under a general power in a city charter to establish and regulate markets, the corporate authorities of the city are about to remove a market house, taxpayers, as such, have no sufficient ground for enjoining the removal, whatever may be the rights of adjacent proprietors and others injuriously affected thereby. So a taxpayer in a city, who files a bill in behalf of himself and other taxpayers to enjoin the city from selling a public park or square, is not entitled to the relief when he has no land abutting upon the square, and when he has no private interest involved other than or different from the body of taxpayers."

In 10 Enc. PL & Prac. 897-900, the general doctrine is thus announced:

"In Suits to Enjoin Public Mischief—(1) Private Individuals as Plaintiffs—Statement of the General Rule. It is settled by numerous authorities, English and American, that a suit for an injunction to restrain apprehended wrongs against the public cannot be maintained by a citizen on the ground that his interest and rights as a member of the state will be interfered with or disturbed, where the injuries which he apprehends are of the same kind as those which will be sustained by the people at large; and this rule has been rigidly adhered to in a great variety of cases,—e. g., suits to restrain public nuisances, purprestures, obstruction of highways, official delinquencies, and usurpations of corporate powers. It has been held that it requires some individual interest distinct from that which belongs to every inhabitant of a municipal corporation to give one of such inhabitants a standing in court, where it is an alleged delinquency in the administration of public affairs which is called in question; and there are cases in which it has been maintained that the fact of owning taxable property is not such a peculiarity as to take the case out of the rule, as all property, with very limited exceptions, is taxable, and every one either has or is capable of acquiring property.

"The Reason for the Rule. The rule is not a technical and arbitrary one, but has a solid foundation of principle, and is sustained by the very sound reasons of public policy, the object of the rule being to protect the defendant against a multiplicity of suits, and to secure him in one suit a final determination of all the controverted questions involved.

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"When Private Individuals may be Plaintiff. Although the rule is firmly established that a suit to enjoin public mischiefs of whatever character must, in general, be instituted by or on behalf of the sovereign of the state, it is equally well settled that a private individual is a proper party plaintiff where the injuries which he will sustain are special and particular, differing in kind, and not merely in degree, from those which the public at large will suffer."

See, also, the case of Baltzger v. Railway Co., 54 S. C. 242, 14 Am. & Eng. R. Cas., N. S., 845.

From the foregoing authorities we are satisfied that the plaintiffs have failed to show such facts as entitle them to equitable relief. Having reached this conclusion, all the questions presented by the defendant's exceptions become merely speculative, and need not be considered.

The plaintiffs, E. W. Robertson and C. H. Manson, also appealed on the ground that his honor erred in failing to enjoin perpetually the operation of trains and the maintenance of a station in Sidney Park. As hereinbefore stated, the plaintiffs, under the facts of the case, are not entitled to the equitable aid of the court.

The plaintiffs also gave notice that they would ask this court to sustain the decree of the circuit court on the additional grounds, to wit: That the city of Columbia held Sidney Park in trust for the use thereof as a public park by all of its citizens, who thereby had the right as cestuis que trustent to invoke the aid of the court of equity in behalf of themselves and other citizens of Columbia to enjoin a destruction of the trust and an interference with its full and free use. These additional grounds are disposed of by what was said in considering the other questions.

It is the judgment of this court that the judgment of the circuit court be reversed, and the complaint dismissed.

POPE, J., concurs in the result.

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GIBBONS v. YAZOO & M. V. R. Co.

(*Supreme Court of Mississippi, Nov. 17, 1902.*)

[33 So. Rep. 5.]

#### Railroads—Cattle Guards.

Code, § 3561, provides that every railroad company shall construct and maintain all necessary or proper stock gaps and cattle guards where its track passes through inclosed land. Several tenants had rented separate tracks of land in an inclosed field, and a railroad company, whose tracts ran through the field, put in the proper stock gaps and cattle guard at the point of entry and departure: *held*, that the company was not required to also put in guards at each place where its track entered the uninclosed parcel of each particular tenant.

Appeal from circuit court, Bolivar county; F. E. Larkin, Judge.

Action by Wm. Gibbons against the Yazoo & Mississippi

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Valley Railroad Company, to recover penalty for failure to construct cattle guards. Judgment for defendant, and plaintiff appeals. Affirmed.

The proof shows that appellant rented land in a large field that was inclosed, and there were a number of other tenants renting parcels of land in the same inclosure; that the railroad tracks run north and south through this inclosed field; that where the track entered the inclosure there was a fence, and between this fence and appellant's land there were other lands, rented by other tenants, and south of the land rented by appellant and between his lands and the south fence other tenants had land rented, but there was no fence or stock gap between the lands rented by appellant and the other tenants, either on the north or south side. The court gave a peremptory instruction to find for the defendant.

Moore & Clark, for appellant.

Mayes & Harris, for appellee.

CALHOON, J. The case of Railroad Co. v. Young (Miss.) 28 South. 826, accords with the other decisions of this court. There the railroad track entered the inclosed land of appellee, and this gave the right to recover the statutory penalty and actual damages. We stand by that case and the cases of Railroad Co. v. Jones, 73 Miss. 397, 18 South. 684, and Railway Co. v. Murrell, 78 Miss. 446, 28 South. 824. Any other construction of the highly penal statute (Code, § 3561) would ascribe to the legislature by implication an intent not warranted by its language, and quite serious in results. Land inclosed must be protected by proper cattle guards; but it was not meant, and was not said, that, where there is a multitude of tenants relying upon a common circumference fence, each can demand the useless thing of a cattle guard where the railway enters his uninclosed parcel.

Affirmed.

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PENNSYLVANIA MIN. & IMP. CO. v. EVERETT & M. C. RY. CO.

(*Supreme Court of Washington, July 14, 1902.*)

[69 Pac. Rep. 628.]

Public Lands—Railroad Grants—Right of Way—Location.

Under 18 Stat. 482, § 1, granting a right of way through public lands to any railroad which shall have filed a copy of its articles of incorporation and due proofs of its organization; and section 4, providing that such railroad shall, within 12 months after the location of any section of 20 miles of its road, file a profile thereof,—where a railroad had filed its articles of incorporation and proofs of its organization as required, its right of way became definitely located by the construction of the road, and its title thereto was good as against a mining claim subsequently located, though the profile map had not been accepted because the land was unsurveyed.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

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Injunction by the Pennsylvania Mining & Improvement Company against the Everett & Monte Cristo Railway Company to restrain the use of a right of way. From a decree for defendant, plaintiff appeals. Affirmed.

W. M. Bickford and Whitney & Headlee, for appellant.

Francis H. Brownell, for respondent.

REAVIS, C. J. Plaintiff, a mining corporation, alleged it was the owner in fee of certain mining claims in Snohomish county, containing valuable mineral deposits; that the defendant, a railroad corporation, had, without any right, license, or color of title, located a line of railroad across certain of the claims; and that, unless restrained, defendant would construct its road in such a manner as to destroy the value of the claims. Plaintiff prays for a perpetual injunction against the use of the right of ways so located by defendant. The answer denies that defendant has sufficient knowledge to form a belief as to the allegations of ownership in the complaint, but alleges, if plaintiff has any interest or estate in said mining claims, such interest is subject and inferior to the rights of defendant. For affirmative defense the answer alleges that defendant in the year 1892 began the construction of its line of railroad, and describes the course of the line; that a large part of its right of way ran through public lands of the United States, and that, desiring to obtain the benefit of the grant by congress of March 3, 1875 (18 Stat. 482), it filed with the secretary of the interior a copy of its articles of incorporation, together with proofs of the organization of the railroad company thereunder, and also a plat of its right of way, so far as the same was located, through the surveyed public lands, which was accepted, and also filed in the United States land office at Seattle a profile of its location through the unsurveyed public lands, but that, under direction of the commissioner of the general land office, this profile was not accepted, upon the ground that it could not be accepted until the lands were surveyed, and that all said placer claims are situate upon unsurveyed public lands; that in the year 1892, and prior to any location of the placer claims, the defendant, pursuant to the rights claimed under said act of congress, went upon the said claims, and cleared its right of way and constructed its line of railroad thereon, and has ever since been in the operation of said railroad upon said right of way, and that whatever rights plaintiff may claim are subject and inferior to defendant's right of way; and that for more than seven years last past defendant has been in open, undisputed, and adverse possession of its said right of way, and operating its railroad thereon, by reason whereof defendant is now the owner thereof. Plaintiff demurred generally to the affirmative defenses of the answer, which demurrer was overruled, and exception taken thereto. No statement of facts or bill of exceptions appears in the record. A trial was had, and find-



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ings of fact and conclusions of law made by the court, which appear in the record. The decree established the right of way in defendant.

The only error available to plaintiff here is the assignment upon the overruling of the demurrer to the affirmative defenses. The question for consideration is the right of the defendant to the right of way under the act of congress set up in the answer. The pertinent portions of the statute are as follows:

"Section 1. That the right of way through the public lands of the United States is hereby granted to any railroad company—which shall have filed with the secretary of the interior a copy of its articles of incorporation and due proofs of its organization under the same to the extent of one hundred feet on each side of the central line of said road. \* \* \*"

"Sec. 4. That any railroad company desiring to secure the benefits of this act shall within twelve months after the location of any section of twenty miles of its road,—file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the secretary of the interior the same shall be noted upon the plats of said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way. \* \* \*"

It will be observed the answer alleges that the profile showing the right of way through the surveyed public lands through which the road runs was filed and accepted, and that a similar profile through the unsurveyed lands was tendered, but the commissioner ruled that such profile could not be accepted until the lands were surveyed; and the answer also states that all the mining claims were and are now situated upon unsurveyed lands. We think the affirmative defenses were sufficient against the demurrer. The federal statute seems to grant a present right of way through the public lands to railway companies which have complied with its provisions. There is no exception of mineral lands specified in the statute. The distinction between lands granted in aid of the construction of railways, and which grants are floating until by definite location of the line they become seated, and the grant of a right of way, is obvious. The construction of the grant of right of way, and definition of what is a valid location thereon, seem to be clearly determined by the supreme court of the United States in the late case of *Railroad Co. v. Jones*, 20 Sup. Ct. 568, 44 L. Ed. 698. The court observed: "But what constitutes a definite location of the right of way? Upon the answer to that question the present controversy hinges. The state courts decided, as we have seen, that the right of way only became definitely located by the filing of a profile map of the road. The contention of the plaintiff in error is that the right of way may be definitely located by the actual



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construction of the road. And this was the ruling of the interior department in *Railroad Co. v. Downey*, 8 Land Dec. Dep. Int. 115, and the ruling has been subsequently adhered to. \* \* \* The ruling gives a practical operation to the statute, and, we think, is correct. It enables the railway company to secure the grant by an actual construction of its road, or in advance of construction by filing a map as provided in section 4. Actual construction of the road is certainly unmistakable evidence and notice of appropriation." This authority is controlling. The findings of fact here cannot, in the absence of the evidence, be questioned.

The facts found fully sustain the decree, and the judgment must be affirmed.

ANDERS, MOUNT, FULLERTON, and HADLEY, JJ.,  
concur.

## UNION PAC. R. CO. v. COLORADO POSTAL TEL. CABLE CO.

(*Supreme Court of Colorado, April 7, 1902.*)

[69 Pac. Rep. 564.]

**Eminent Domain—Authority of Commissioners.**

Under Mills' Ann. St. § 1720, providing that the court may appoint commissioners to ascertain the necessity for condemning lands, such commissioners had no authority to determine whether the taking was for a private use, but merely to determine the quantity of land needed.

**Same—Necessity for Taking—Public Use—Waiver.**

Where, in a proceeding to condemn land, no objection was made to the appointment of commissioners, and no attempt was made to submit to the court questions of whether the taking of the land was for a private use or whether there was a necessity therefor until after the report was filed, the right to have such questions determined by the court was waived.

**Same—Public Use—Telegraph Lines—Construction for Sale—Foreign Capital.**

The mere fact that the articles of incorporation of a telegraph company seeking to condemn property showed that it was organized to sell the lines of telegraph it might construct within the state, in connection with evidence that the money to build its lines was to be furnished by a foreign corporation under whose control it was to be did not establish in law an intent to take such property for a private use.

**Charters—Collateral Attack.**

Where it appears from the articles of incorporation of a corporation that it is duly organized and existing under the laws of the state, its charter cannot be attacked in a collateral proceeding.

**Same—Condemnation of Railroad Right of Way for Telegraph Line—Effect of Existence of Adjacent Highway.**

A telegraph company cannot be prevented from condemning a way for its line along a railroad right of way merely because there is a highway adjacent to the proposed route along which such line could be constructed, as allowed by Mills' Ann. St. § 587, in the absence of a showing of bad faith, a malicious motive, or that the taking of the particular tract would entail a great loss, which might be readily avoided.

**Same—Same—Consent of Municipality.**

A railroad company could not object to the condemnation of its right of way by a telegraph company on the ground that the latter had not

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obtained leave from the municipal authorities to erect its line through the towns along the proposed route, as required by Mills' Ann. St. § 588. Same—Same—Public Use—Pleading.

A petition in a proceeding to condemn property, alleging that the petitioner was a corporation organized to erect telegraph lines, was not insufficient because it failed to allege that the line was to be public, as Mills' Ann. St. §§ 589, 590, requires companies organized for the purpose of maintaining telegraph lines under section 587 to receive and transmit messages from other companies engaged in the same business, and also messages tendered by any person.

Same—Same.\*

A railroad company cannot successfully resist the condemnation by a telegraph company of a right of way along its line, as allowed by Laws 1885, p. 385, unless it appears that the use of the land is necessary to the operation of the railroad or of other lines of telegraph already erected thereon.

Same—Title Acquired.

Though the eminent domain act seems to recognize that the title acquired in condemnation proceedings is a fee, where a railroad right of way is condemned by a telegraph company, title thereto must be controlled by Laws 1885, p. 385, which provides that in such cases the line shall be so constructed and maintained as not to obstruct or hinder the usual operation of the railroad, clearly importing that the character of the title acquired is merely an easement.

## On Rehearing.

Rehearing.

Where the only objection advanced at the original hearing of a cause to the propriety of an instruction given in a proceeding to condemn land was that it advised that the title to the right of way sought to be condemned by a telegraph company was only an easement, objections based on other grounds will not be considered on rehearing.

Error to district court, Arapahoe county.

Action by the Colorado Postal Telegraph Cable Company against the Union Pacific Railroad Company to condemn land for right of way. From a judgment for petitioner, respondent brings error. Affirmed.

Teller & Dorsey, for plaintiff in error.

Benedict & Phelps, for defendant in error.

GABBERT, J. Defendant in error, as petitioner, instituted an action in the court below against plaintiff in error, as respondent, to condemn a right of way longitudinally through the lands of the latter, upon which to erect and maintain a telegraph line. Such proceedings were had that commissioners were appointed without objection from either party, who heard the testimony and reported to the court. This report was adopted, and a judgment and decree rendered accordingly. To review the proceedings, respondent brings the case here on error.

Some of the errors assigned are predicated upon the matters incorporated in what is termed a bill of exceptions, which petitioner contends cannot be considered. To test this ques-

\*See foot-note appended to Postal Tel. Cable Co. of Montana v. Oregon Short Line R. Co. (C. C. Mont.), 3 R. R. 432, 26 Am. & Eng. R. Cas., N. S., 432.

tion, its counsel moved to strike the bill of exceptions from the files. We shall not determine this motion, for, assuming that the matters in the bill upon which error is based by counsel for respondent are thereby properly presented, we are satisfied that the errors assigned upon what is thus disclosed are insufficient to work a reversal. For answer respondent alleged that petitioner is a corporation organized to take property for the use of a foreign corporation, so as to enable the latter to evade the laws of this state, and that there extended along and adjacent to the lands of respondent, through which petitioner was seeking to condemn a right of way, a public road, upon which petitioner is authorized, under the laws of the state, to construct its proposed telegraph line. After the appointment and qualification of the commissioners, and before proceedings to hear the testimony, counsel for respondent requested certain instructions, which were refused. At the request of counsel for petitioner, others were given. Those requested by respondent and refused were to the effect that a corporation cannot take land by the exercise of the right of eminent domain except for a public use, and then only when a necessity exists for the land so sought to be taken; and that the necessity meant by the statute is not established by proof that such land is convenient for the purposes for which it is intended to be used, or will lessen the cost of constructing the structures which the petitioner proposes to erect thereon. Inter alia, the court instructed the commissioners, in substance, that, in the absence of bad faith or improper motives on the part of petitioner, it had the right to determine the route and location of its line of telegraph; and if its proper officers in good faith had determined to build such line, and had selected the right of way in question upon which to construct it, then the necessity mentioned in the statute is established. At the hearing before the commissioners, petitioner introduced its articles of incorporation, from which it appears that the objects for which it is incorporated are the construction, acquisition by purchase or otherwise, maintenance, and operation of telegraph lines in the state of Colorado, and the sale or other disposition of such lines. Respondent offered to prove that these articles of incorporation were drawn and executed at the request of the Postal Telegraph Cable Company of New York; that no stock had ever been subscribed and paid for, except sufficient to authorize the qualification of directors; that it was not expected the latter would raise any money by subscription to stock or otherwise; that all money would be furnished by the New York company; and that both directors and officers of petitioner would be under the direction and control of that company. Respondent also offered to prove the existence of a highway along, adjacent, and near to respondent's right of way for the whole distance, upon which a telegraph line could easily and cheaply be constructed. It also offered to prove that the petitioner had not obtained

leave from the corporate authorities of certain towns through which the proposed line of telegraph must be constructed in utilizing the right of way sought to be condemned to construct its line through such town. These offers were refused. On the filing of the report the respondent moved to dismiss the proceedings because no proofs had been offered by the petitioner tending to prove the necessity for taking the right of way in question, which motion was denied.

Counsel for respondent contend that these several matters present prejudicial error, for the reason that petitioner had failed to prove that the property sought to be condemned was to be taken for a public use, or that there was any necessity for taking it. It is also urged that, in view of the issues made by the pleadings, the respondent had the right to introduce at the hearing before the commissioners the testimony refused, for the reason that such testimony tended to establish a state of facts from which it would appear the taking of the land in question was for a private, and not a public, use, and that there was no necessity for such taking. These matters might well be disposed of upon the ground that the law does not contemplate that commissioners in condemnation proceedings shall consider or determine such questions. On the contrary, they are to be determined by the court or judge, but, unless so presented for determination before the appointment of commissioners, or the right to do so is in some way reserved, they are waived. Section 1720, 1 Mills' Ann. St., provides that the court or judge may appoint a board of commissioners to ascertain the necessity for taking lands sought to be condemned. What propositions may be raised upon the question of necessity will vary according to the circumstances of each particular case. In this instance, however, so far as disclosed by the pleadings, or any matter discussed in the briefs, we are of the opinion that the authority of the commissioners on that question would be limited to a determination of the one of quantity of land, or, more accurately speaking, the width of the proposed right of way sufficient to serve the reasonable physical needs of petitioner in erecting and maintaining its telegraph line. Ordinarily, the authority of commissioners on the subject is so limited. In effect, this court has so decided in the recent case of *Gibson v. Cann* (Colo. Sup.) 66 Pac. 879. It was certainly never intended that commissioners should be required to determine questions the solution of which depends upon the application of intricate questions of law such as would be presented by the trial of issues tendered by the answer of respondent. This court has frequently decided, in cases where the question of damages in condemnation proceedings was submitted to a jury, that the only matter proper for the jury to consider was the one of damages, and that all other questions must be settled in limine. *Irrigation Co. v. Davis*, 17 Colo. 326, 29 Pac. 742; *Thompson v. Reservoir Co.*, 25 Colo. 243, 53 Pac. 507; *Siedler*

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v. Seely, 8 Colo. App. 499, 46 Pac. 848; Colorado Fuel & Iron Co. v. Four Mile R. Co., 28 Colo. —, 66 Pac. 902. On principle the same rule is applicable to the case at bar. The commissioners were appointed without objection on the part of respondent. There was no attempt upon its part to submit to the court the determination of any of the questions of fact upon which it relied to defeat the proceeding until after the report was filed. Respondent did not seek to prove that petitioner did not require the quantity of land sought to be condemned, nor by its pleadings was any such defense suggested. None of the matters above mentioned which respondent sought to submit to the commissioners were of a character which it was the province of that body to determine; and by the course pursued the right to have them determined by the court was waived. The reason for this conclusion is obvious. If, for any reason, the petitioner in condemnation proceedings is not entitled to exercise the right of eminent domain, or take a particular tract, these questions should be determined by the court in limine. If adverse to the petitioner, that is the end of the proceeding. *Irrigation Co. v. Davis*, supra. In this connection we call attention to the case last cited. In that case the petitioner sought to have a right of way condemned through an already-existing ditch. It was held that, if the respondent desired to have the question of the feasibility and practicability of taking a right of way through such ditch determined, the question should have been referred to a board of commissioners appointed by the court, as the law directs. This holding, however, was based upon the provisions of sections 2261, 2262, 1 Mills' Ann. St., which provide that lands improved or occupied shall not, without the written consent of the owner, be subjected to the burden of more than one irrigating ditch constructed for the purpose of conveying water through such property to lands adjoining or beyond, when the object can be feasibly and practicably attained by uniting and conveying all the water necessary through such property in one ditch; and that, where it is necessary to convey water for the purposes of irrigation through the improved or occupied lands of another, the shortest and most direct route practicable upon which such ditch can be constructed shall be selected. These provisions, however, have no application to the case at bar. Neither were they invoked in *Gibson v. Cann*, supra. Both parties, however, appear to have treated the question of necessity as raised by the pleadings and testimony offered as being proper to submit to the commissioners, and for that reason we shall treat it as properly presented for review.

The several assignments of error argued by counsel for respondent, including those based upon the instructions refused and given with respect to what constitutes a taking for a public use, the necessity for such taking, and the right of petitioner to determine the route and location of its line, ex-



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cept those specially noticed later, may be considered under this proposition: Did the evidence offered on behalf of the respondent and refused, as above noticed, tend to prove that petitioner was not seeking to condemn a right of way for a public use, or tend to establish facts which would defeat the proceeding? Counsel for respondent contends that it does, for the reasons: (1) That this testimony would have established that the right of way was to be subjected to a private use; and (2) there was no necessity for taking a right of way through the lands of respondent. In support of the first proposition it is urged that the articles of incorporation of petitioner disclose that it was organized to sell or otherwise dispose of the lines of telegraph which it might construct or acquire in this state, and that this fact, in connection with the testimony offered to the effect that it was the creature of a foreign corporation, and not its honest intention to operate the line in question except in the interest of and in connection with that corporation, established in law an intent to take the property of respondent for a private use. There is nothing in the spirit or policy of the law which prohibits the same persons from organizing two or more corporations with the intention that they shall be operated in conjunction with each other. Neither does the law prohibit a corporation from accepting financial assistance from another. It should be the policy of this state to encourage the construction and operation of competing lines of communication between points within its own borders and those located within other states. In many instances this can only be effected by corporations organized under our laws acting in conjunction with those created under the laws of a sister state. One of the essential attributes of property is the right to sell, and, unless this right is limited by law, it necessarily exists. Further, it appears from the articles of incorporation of petitioner that it is duly organized and existing under the laws of this state, and its charter cannot be attacked in a collateral proceeding. *Kansas & T. Coal Ry. Co. v. Northwestern Coal & Mining Co.*, 161 Mo. 288, 61 S. W. 684; *In re New York, L. & W. Ry. Co.*, 35 Hun, 220, affirmed 99 N. Y. 12, 1 N. E. 27; *Frost v. Coal Co.*, 24 How. 278, 16 L. Ed. 637; *Postal Tel. Cable Co. of Utah v. Oregon Short Line R. Co. (Utah)* 65 Pac. 735; *Postal Tel. Cable Co. of Idaho v. Oregon Short Line R. Co. (C. C.)* 104 Fed. 623; *Oregon Short Line R. Co. v. Postal Tel. Cable Co. of Idaho*, 49 C. C. A. 663, 111 Fed. 842. In the last three cases cited the identical question presented by the answer of respondent and the testimony offered relative to the good faith and power of petitioner was raised in the same manner as in the case at bar, and in each instance it was held that the matters thus presented were wholly immaterial.

It is urged that, if respondent had been permitted to prove the existence of a highway adjacent to the route upon which petitioner proposes to erect its telegraph line, and also prove

that leave to erect such line through certain incorporated towns through which the proposed right of way extends had not been secured from the municipal authorities of such towns, then no necessity for taking the lands of respondent would have been established. In support of this proposition we are referred to section 587, 1 Mills' Ann. St., which provides that telegraph companies organized under the laws of this state may construct their line along and upon the public roads; and section 588, which inhibits such companies from constructing their lines upon the streets or alleys of an incorporated town without the consent of the corporate authorities. The legislature has vested corporations of the character of petitioner with discretion in locating their telegraph lines. Ordinarily, the courts cannot exercise supervision with respect to such matters. The discretion which the corporation may exercise in determining the route of its lines cannot be interfered with in the absence of a showing of bad faith, a malicious motive, or that the taking of a particular tract sought to be condemned would entail a great loss, which might readily be avoided. *Railroad Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385; *Railway Co. v. Hooper*, 76 Cal. 404, 18 Pac. 599; *Railroad Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Railroad Co. v. Dunbar*, 100 Ill. 110. There was no showing of this character on the part of the respondent. True, it did introduce evidence to the effect that the erection of a telegraph line along its right of way would cause some inconvenience, and might possibly increase the hazard of railroading, but in no greater degree in this particular instance than other railroads must suffer from the erection of telegraph lines adjacent to their railroad tracks, —a condition which exists almost without exception along every line of railroad in the United States. On behalf of respondent it is contended that, in the absence of leave from the municipal authorities of the towns situate along the proposed right of way to erect and maintain its line through such towns, and through which the lands sought to be condemned extend, petitioner could not take such lands, because the proceedings must be regarded as an entirety. This question does not concern respondent. If petitioner cannot erect its line of telegraph through the towns in question, except it obtain leave to do so from the corporate authorities, and fails to obtain such leave, respondent is not injured. Petitioner cannot use the right of way situate within the corporate limits of towns except for the purposes for which it is taken. If it never utilizes the right of way within such limits, respondent cannot complain. Petitioner might be able to build its line around such towns, but that certainly can make no difference to respondent. *Railroad Co. v. Kimball*, 61 Cal. 90; *Railroad Co. v. Dunbar*, *supra*.

The motion to dismiss heretofore noticed was also based upon the ground that the petition was insufficient. In support of this claim it is urged: (1) It does not appear from the

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statements of the petition that the telegraph line of petitioner is to be public; and (2) property held by one corporation for a public use cannot be taken by another for the same purpose and use. The object for which land is taken determines whether or not the use to which it is to be subjected, when condemned, is public. *Denver R. L. & C. Co. v. Union Pac. R. Co.* (C. C.) 34 Fed. 386. In the petition it is alleged that petitioner is a corporation organized for the purpose of erecting and maintaining lines of magnetic telegraph in this state. The law of the state provides that companies may be organized for the purpose of maintaining telegraph lines. Section 587, 1 Mills' Ann. St. The business which such companies are authorized to transact is public in its nature. They must receive and transmit messages from other companies engaged in the same business, and transmit messages tendered by any person. Sections 589, 590. Counsel for respondent recognize that property held for a public use is subject to the eminent domain power of the state, but contend that such property cannot be taken by another to be used for the same purpose for which it is already held. The case made does not fall within the exception claimed. Proceedings in condemnation may be maintained by a telegraph company against a railroad corporation. Laws 1885, p. 358. It appears there is already a line of telegraph along the respondent's right of way. The evidence discloses, however, that the proposed line of petitioner will neither interfere with this line nor with the operation of respondent's railroad. There is ample room for all. No property of respondent will be taken which is already devoted to or needed for a public use, and it is, therefore, not in a position to insist that property held by it for a public use will be taken by another for the same or a different use. The mere fact, therefore, that petitioner seeks to condemn a right of way through lands belonging to a railroad company does not render the petition insufficient. The respondent cannot successfully resist the condemnation of such right of way unless it appears that its use was necessary to the maintenance and operation of its railroad and the lines of telegraph already erected thereon, or is needed for such purpose. That property held for a public use may be taken under the exercise of the right of eminent domain for the same or a different public use, when such taking does not materially interfere with the uses for which it is already held, has been recognized in a great number of cases in which this subject has been considered. *Mobile & O. R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21, 24 South. 408; *Southern Pac. R. Co. v. Southern California R. Co.* (Cal.) 43 Pac. 602; *Southwestern Telegraph & Telephone Co. v. Gulf, C. & S. F. R. Co.* (Tex. Civ. App.) 52 S. W. 106; *Postal Tel. Cable Co. of Utah v. Oregon Short Line R. Co.* (Utah) 65 Pac. 735; *Salt Lake City v. Salt Lake City Water & Electrical Power Co.* (Utah) 67 Pac. 672; *Colorado E. R. Co. v. Union Pac. R. Co.* (C. C.) 41 Fed. 293.

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The final question to be considered relates to an instruction on the question of damages. This instruction is to the effect that the declarations in the petition covering the manner of the construction of the telegraph line were binding upon the petitioner, and, if right of way was granted, the construction of the line must be in accordance with such declaration. It is said this instruction is erroneous, because, according to the statements in the petition, it was only sought to condemn an easement. Counsel for respondent contend that under the eminent domain act nothing less than a fee can be taken, and that the damages should have been assessed upon the basis that the title taken by petitioner was of that character. Neither of these reasons is tenable. The statute which authorizes telegraph companies to condemn part of the right of way belonging to a railroad company (Laws 1885, supra) must be construed in connection with the chapter on the subject of eminent domain. While it is true the latter seems to recognize that the title taken in condemnation proceedings is a fee, the act above referred to was passed subsequent to the section containing this provision, and therefore must control the title which telegraph companies may take by eminent domain proceedings in the right of way of a railroad company. The language of the act clearly imports that an easement is the character of title which a telegraph company may condemn in such way, for it expressly provides that the line shall be so constructed and maintained as not to obstruct or hinder the usual operation of the railroad along the right of way on which the line is constructed. The spaces over which the wires are strung from pole to pole are not taken by petitioner. The language of the petition relative to the use to which the right of way is to be subjected, and the manner in which the telegraph line is to be constructed and maintained, as well as the act of 1885, supra, recognize that an easement only is claimed and can be taken, and that the respondent still has the right to use its right of way for railroad purposes, except so far as the poles erected may interfere with that use, subject, however, to the right of petitioner to enter for the purpose of erecting and repairing its line. Under statutes similar to our own (Laws 1885, supra) it has been decided in other states that the title acquired by a telegraph company by condemnation proceedings in the right of way of a railroad company is merely an easement. *St. Louis & C. R. Co. v. Postal Tel. Co.*, 173 Ill. 508, 51 N. E. 382; *Mobile & O. R. Co. v. Postal Tel. Cable Co.*, 76 Miss. 731, 26 South. 370, 45 L. R. A. 223.

The judgment of the district court is affirmed. Affirmed.

On Petition for Rehearing.

(July 5, 1902.)

PER CURIAM. Complaint is made that no decision was rendered on the alleged errors of the commissioners in receiv-



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ing testimony on behalf of petitioner as to the value of the lands taken for agricultural purposes, and rejecting that offered on behalf of respondent as to their value for railroad purposes. In the brief of counsel for respondent reference is made to these matters, but no argument whatever was offered for the purpose of showing wherein the reception and rejection of such testimony was erroneous, and for that reason they were not referred to in the opinion. The only argument on the subject of damages was limited to a discussion of the instruction which it was said advised the commissioners that the title to the right of way sought to be condemned was only an easement. In the answer filed by respondent it was stated that the land sought to be taken was a part and parcel of a right of way granted by the government to the predecessors of respondent, on condition that a continuous railroad and telegraph line should be constructed and maintained along and on such land. Wherein the source of title, or the purpose for which the right of way was granted by the general government, were material, was not argued by counsel, and therefore no opinion was expressed on the question or questions thus sought to be raised by the answer. We are now asked to grant a rehearing, so that such questions may be discussed and determined. This must be refused, because a proposition not advanced at the original hearing of a cause will not be considered on rehearing. *Morgan v. King*, 27 Colo. 539, 63 Pac. 416. If new questions could be urged after decision rendered, there would be no end to a case brought here on appeal or error.

Petition for rehearing denied.

PLANT v. HERATY *et al.*

(*Supreme Court of Michigan, Nov. 18, 1902.*)

[92 N. W. Rep. 284.]

## Street Railways—Injury to Traveler—Contributory Negligence.

Where plaintiff was injured while attempting to drive across the street on which there were two car tracks, and his attention was entirely occupied by a car coming on the west-bound track, which fact could have been seen by a motorman on an east-bound car, and such east-bound car collided with plaintiff, having approached without ringing its bell, as required by the ordinance, the question of plaintiff's contributory negligence was for the jury; his hearing not being impaired, and it being probable that he would have known of the east-bound car if the customary signals had been given.

Grant, J., dissenting.

Error to circuit court, Bay county; Theodore F. Shepard, Judge.

Action by Daniel Plant against Michael P. Heraty and another, receivers of the Bay Cities Consolidated Street Railway Company. There was a judgment for defendants, and plaintiff brings error. Reversed.



## Plant v. Heraty

Devere Hall, for appellant.

T. A. E. & J. C. Weadock, for appellees.

MOORE, J. The plaintiff, a farmer, while driving north on Saginaw street, crossing Center street, in Bay City, was struck by a street railway car. This suit was brought to recover damages for the injuries he received. After the witnesses for plaintiff had been sworn, and before any proof had been offered by defendants, the circuit judge directed a verdict in favor of defendants. The case is brought here by writ of error.

The city ordinance, under which the street cars were allowed to run, required the cars to be equipped with a suitable alarm bell, which was to be rung at least 50 feet from each street crossing, as the car approached the crossing. Center street runs east and west. Saginaw street runs north and south. It is the claim of plaintiff that he was driving a gentle horse attached to an open, light wagon, in which he was sitting upon an inverted bushel basket; that he stopped near where the south sidewalk on Center street crossed Saginaw street, to enable a person who was riding with him to alight; that before starting his horse north he looked and saw one of defendants' cars about 100 feet west of Saginaw street, standing still; that at the same time he saw a suburban car to the east, which was coming west, ringing its bell; that, believing he had ample time to cross Center street, he started his horse for the purpose of doing so; that for a moment he doubted whether he had time to pass ahead of the suburban car, and slackened the pace of his horse, but concluded he had ample time to do so, and urged it forward; that his attention was wholly occupied by the suburban car after he started to cross the street, and that if the motorman had been observant he would have noticed the fact. The plaintiff crossed the track upon which the suburban car was running safely. In the meantime the car which was standing west of Saginaw street started east, and it is the claim of plaintiff the motorman gave no warning of the approach of the car, and that plaintiff had no reason to suppose he was in danger from it until his wagon was struck by it, and he was thrown as high as the car, and suffered very severe injuries.

If the motorman ran his car east under the circumstances, and without any warning being given by him, as indicated by the testimony of the witnesses for plaintiff, he was negligent, and the plaintiff should be allowed to recover unless he is precluded from doing so by his own act. The case is not free from doubt. It is near the border line. We think, however, the testimony was for the jury, and that it cannot be said as a matter of law that plaintiff was guilty of such negligence as to preclude him from recovering. His attention was occupied more or less by the approaching suburban car, which was giving warning of its approach by the ringing of its bell. Before he started across the street he saw that the car to the west

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was standing still. It was the duty of the person in charge of it to signal its approach to the crossing by the ringing of the bell. The testimony discloses plaintiff's hearing was not impaired. The motorman could see the plaintiff, and could see that his attention was occupied by the suburban car. We think the case falls within the following cases: *Rouse v. Railway Co.* (Mich.) 87 N. W. 68; *Edwards v. Foote* (Mich.) 88 N. W. 404; *Tunison v. Weadock* (Mich.) 89 N. W. 703, and the cases cited therein.

Judgment reversed and new trial ordered.

HOOKER, C. J., and MONTGOMERY, J., concurred with MOORE, J.

GRANT, J. (dissenting). I think the learned circuit judge properly directed a verdict, and for the reasons stated in his instructions. Plaintiff knew that there were two tracks; that cars were liable to run each way at any moment; that stops were brief, for the purpose of letting passengers on and off; and that if the car was at the time standing still it was liable to start any moment. He kept his attention fixed on the moving car coming from the east. He had stopped about 40 feet from the track, near the sidewalk, to let his companion get out. He then started to cross, but, seeing the car approaching from the east, he "pulled up, and pretty near stopped again." Then, thinking he had plenty of time to avoid this car, he drove on. He admitted that a glance to the left would have shown him the other car approaching, and that if he had so glanced he could and would have avoided the accident. There is no claim that the car was going beyond the rate of speed fixed by the ordinance, to wit, six miles per hour. The car stopped only momentarily at the switch, about 100 feet away, when evidently plaintiff saw it. The only witness upon the car (Judge Maxwell) testified that he was not sure whether it just slowed up or stopped.

It was as much the duty of the plaintiff to look out for himself and watch the car as it was the duty of the motorman to watch the plaintiff. Their obligations were mutual. If both violated such obligations, and acted negligently, neither can recover for injuries received. The motorman had the right to assume that the plaintiff, riding in plain sight, would and did see the car, and was under no obligation to bring his car to less than the allowed rate of speed, or to attempt to stop it until he saw that plaintiff was taking no heed, and was about to ride into danger. If a motorman were obliged to assume that every one he saw approaching the track upon a public highway did not see it, and bring his car to a stop, the demands of public travel could not well be met. We so held in a case where the ordinance required street cars to stop when crossing the track of another road. It was there held that the motorman, who had made the stop required by the ordinance, and attempted to cross another road, whose car was approaching 150 to 200 feet away, and did not make the re-

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quired stop, was not guilty of contributory negligence. We there said: "If he must wait before he can go forward until he knows that the approaching car will stop, he will fail to meet the demands of modern street railway traffic." *Becker v. Railway Co.*, 121 Mich. 580, 586, 80 N. W. 581.

For the same reason a motorman cannot be required to check his car to less than a lawful rate of speed upon the assumption that a person, driving in his vehicle, does not see him. I think the case is expressly ruled by the following decisions of this court: *McCarthy v. Railway Co.*, 120 Mich. 400, 79 N. W. 631; *Hilts v. Foote*, 125 Mich. 241, 84 N. W. 139; *Bennett v. Railway Co.*, 123 Mich. 692, 82 N. W. 518; *Henderson v. Railway Co.*, 116 Mich. 368, 374, 74 N. W. 525; *McGee v. Railway Co.*, 102 Mich. 107, 60 N. W. 293, 26 L. R. A. 300, 47 Am. St. Rep. 507; *Doherty v. Railway Co.*, 118 Mich. 209, 76 N. W. 377, 80 N. W. 36. In *Hilts v. Foote* we said: "Thompson [the driver] had ample time to look both west and east in time to see the approaching car, and stop so as to avoid the accident. It was his duty to do so." It was equally the duty of the plaintiff in this case to do likewise. He had no right to assume either that the car would stand still until he had crossed, or that the motorman saw that he did not intend to stop, but to drive across, regardless of consequences.

The judgment should be affirmed.

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MARTIN v. CHICAGO, R. I. & P. R. Co.

(*Supreme Court of Iowa, October 25, 1902.*)

[91 N. W. Rep. 1034.]

**Railroads in Streets—Ordinance Limiting Speed.\***

An ordinance of a city prohibiting trains from moving within the corporate limits at a speed exceeding six miles an hour has not for its sole object the protection of those crossing the tracks, but its benefit may be claimed by any person coming within its protection.

**Same—Same—Assumption of Risk.**

Where a brakeman enters into the employ of a railroad with the knowledge that in running through a city it exceeds the rate of speed allowed by an ordinance of the city, he assumes the risk of such increased speed, though it arises from the violation of the ordinance.

**Same—Same—Same.**

Where a brakeman enters into the employ of a railroad, assisting in operating trains at a rate of speed in excess of the rate allowed by an ordinance of the city, he cannot recover of the railroad company, when injured when the train was running in excess not only of the speed permitted, but of its customary speed, unless that speed was not only negligence, but was the operating cause of his injury.

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\*See *Baltimore, etc., Ry. Co. v. Peterson (Ind.)*, 20 Am. & Eng. R. Cas., N. S., 887. See also, monograph appended to *Martin v. Chicago, R. I. & P. R. Co. (Iowa)*, 1 R. R. R. 397, 24 Am. & Eng. R. Cas., N. S., 397.

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Appeal from district court, Scott county; James W. Bolinger, Judge.

Action for damages. Judgment on directed verdict. The plaintiff appeals. Affirmed.

E. M. Sharon and Ely & Bush, for appellant.  
Cook & Dodge, for appellee.

LADD, C. J. The freight train, composed of 13 loaded cars, 26 empties, and the caboose, was made up at Rock Island, from which place it departed at 5 o'clock in the morning. When it reached Perry street, in Davenport, a second engine or "helper" was attached, and together the two pulled the train west to Farnam, where the absence of the head brakeman was first discovered. Evidently he had fallen from the top of the train about 15 or 20 feet west of Fillmore street, in Davenport. The circumstances warranting this inference are: (1) A dint in the snow between the tracks at that place, as though a person had fallen some distance on the hip; (2) his lantern just outside of the track; (3) parts of his body and blood stains from that point to the place where the head and trunk were found. It may also be inferred that he fell between the third and fourth cars from the engine, for blood stains were found on the front trucks of the fourth car, and from there on back. The running board of the third car was about a foot wide, while that on the fourth car was a foot higher, and consisted of three strips about an inch apart, and projecting over at the end 5 or 6 inches. The tops were frosty, but upon examination no indications that he had slipped were discovered. The wind was blowing from the northwest, the direction the train moved, at a velocity of five miles an hour. The temperature was  $11\frac{1}{2}$  degrees above zero; the humidity of the atmosphere, 90 per cent. Fillmore street is one block west of the semaphore, two blocks west of Marquette street. Between these streets are five switches,—one at the semaphore, connecting with defendant's branch line to the southwest, and the others with tracks to local industries. From Perry street to Fillmore the road was slightly undulating, but from Fillmore street to Farnam, a block less than 2.7 miles away, the up grade was  $47\frac{1}{2}$  feet to the mile. Opinions as to the speed of the train differ widely, but the jury might have found it anywhere between 12 and 25 or 30 miles per hour. All agree that it exceeded 6 miles an hour, the limit fixed by the ordinance of the city of Davenport. The defendant, then, was negligent in violating the ordinance, and the three grounds of the motion on which the jury were directed to return a verdict raise the questions: (1) Did such negligence occasion the injury to deceased? (2) Did deceased, by any fault on his part, contribute to his injury? And (3) had he assumed the risk of the high rate of speed at which the train was moving?

1. The ordinance of the city of Davenport prohibited trains

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from moving within the corporate limits at a speed exceeding six miles an hour. The evidence showed that it was customary on defendant's line for trains such as that in question to leave for the west at a much higher speed, in order to make the grade; and, as deceased had been engaged in work as brakeman something like seven months in all, he must have known of this practice. Of course, the mere fact that defendant habitually violated the ordinance does not relieve it from the imputation of negligence. *Hamilton v. Railroad Co.*, 36 Iowa, 31; *Beard v. Railway Co.*, 79 Iowa, 522, 44 N. W. 800, 42 Am. & Eng. R. Cas. 445, 7 L. R. A. 280, 18 Am. St. Rep. 381; *Weber v. City of Creston*, 75 Iowa, 16, 39 N. W. 126; *Connors v. Railway Co.*, 74 Iowa, 383, 37 N. W. 966. Nor can it be said that ordinances of this character have for their sole object the protection of those having occasion to go on or across the tracks. They are not thus limited in their terms. Their benefit may be claimed by any person coming within their protection. *Railroad Co. v. Gilbert*, 157 Ill. 354, 41 N. E. 724; *Railway Co. v. Eggmann*, 170 Ill. 538, 48 N. E. 981, 62 Am. St. Rep. 400; *Railroad Co. v. Moore* (Ind. Sup.) 53 N. E. 290, 44 L. R. A. 638; *Bluedorn v. Railway Co.*, 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615. Nevertheless the evident purpose in their enactment is to guard against injury to those using the streets, rather than the employees of the railroad engaged in operating the trains. In undertaking the work of brakeman with knowledge that the ordinance was ignored by the railroad company, or continuing at work without complaint after ascertaining the fact, did deceased assume the risk of the danger incident to its violation? The authorities are in sharp conflict on this proposition. Those holding that such a risk is never assumed go on the theory that, as the assumption of risk is based on an implied contract, it would be opposed to sound public policy to permit one to agree in advance to a violation of a statute or city ordinance. In *Narramore v. Railroad Co.*, 17 Am. & Eng. R. Cas., N. S., 502, 37 C. C. A. 499, 96 Fed. 298, 48 L. R. A. 68, the statute enjoined on railroad companies the duty of blocking switches, and Judge Taft, after reviewing the decisions, concluded that: "'Assumption of risk' is a term of the contract of employment by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself, but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers, the risk of which he agreed expressly to assume. The master is not, therefore, guilty of actionable negligence toward the servant. \* \* \* This makes logical that most



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frequent exception to the application of doctrine by which the employee who notifies his master of a defect in a machinery or place of work, and remains in the service on a promise of repair, has a right of action if the injury results from the defect while he is waiting for repair of the defect, and has reasonable ground to expect it. \* \* \* If, then, the doctrine of the assumption of risk rests really upon contract, the only question remaining is whether the courts will enforce or recognize, as against a servant, an agreement, express or implied, on his part, to waive the performance of a statutory duty of the master, imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract, and it would entirely defeat this purpose thus to permit the servant to contract the master out of the statute. It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute, and yet, if the assumption of risk is the term of a contract, then the application of it in the case at bar is to do just that." This is perhaps the clearest expression of the reasons persuading some courts to hold that in such cases the maxim, "*volenti non fit injuria*," will not apply. The point appears to have been touched upon in several English cases. See *Thomas v. Quartermaine*, 18 Q. B. Div. 685; *Baddeley v. Granville*, 19 Q. B. Div. 423. In the latter, a statute required a banksman to be present at the mouth of a pit when miners were going up and down. During the night it was the defendant's practice to dispense with him, and of this the plaintiff was aware. The injury was in consequence of this omission. The court held that plaintiff could recover; Wills, J., saying: "There ought to be no encouragement given to the making of an agreement between A. and B. that B. shall be at liberty to break the law which has been passed for the protection of A. Such an agreement might be illegal. \* \* \* But it seems to me that if the supposed agreement between the deceased and defendant, in consequence of which the principle of '*Volenti non fit injuria*' is sought to be applied, comes to this: that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others, as well as of himself,—such an agreement would be in violation of public policy, and ought not to be listened to." A careful reading of the opinions in *Durant*

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v. Mining Co., 97 Mo. 62, 10 S. W. 448, Grand v. Railroad Co., 83 Mich. 564, 47 N. W. 837, 11 L. R. A. 402, Coal Co. v. Taylor, 81 Ill. 590, and Boyd v. Coal Co. (Ind. App.) 50 N. E. 368, cited in the Narramore Case, discloses that, although the question might have been raised, it was not, in any of them. We think the learned judge, in writing that opinion, assumed too much, in treating the assumption of risk as purely a matter of contract. True, the books speak of it as resting on an implied agreement between the employer and employee. It is more accurate to say that the services of the one are engaged by the other, and from the relationship the law implies certain duties, obligations, and disabilities. No mention is made of these, but they pertain to the relationship of the parties and the status then assumed.

Says Mr. Dresser, in his valuable work on Employers' Liability (section 82): "The contract of hiring depends upon the same principles as other contracts, yet it has one peculiarity, in that it creates a status or relationship between the parties, to which the policy of the law has affixed certain rights, duties, and disabilities to be observed by each, irrespective of any understanding or supposed agreement between them. These duties and disabilities arise when the relation is created, and continue until it ends, and for the most part are determined by the condition of affairs when the contract of hiring is made. It is usual and convenient to treat them as terms of an implied contract, but it is a contract implied from the relationship, and not from the agreement of the parties, and has none of the incidents of a technical contract." The author then points out that no consideration is essential, as a mere volunteer may be in the same position as though hired, and an infant whose agreements are voidable may assume disabilities as an adult. See Barstow v. Railroad Co., 143 Mass. 535, 10 N. E. 255, 28 Am. & Eng. R. Cas. 473. If based on contract alone, then an action for injury by the servant, resulting from a breach of a duty assumed by the master, should be *ex contractu*. As said in Jag. Torts, 23: "Such rights and duties are not properly contractual, nor is their breach a contract wrong." See Ames v. Railroad Co., 117 Mass. 541, 19 Am. Rep. 426. The breach is of a duty which the law implies from their relationship, and is, like any other omission of duty which the law exacts, negligence. The master's liability may be tested either by considering the employee's conduct, and answering whether, in view of his undertaking, he took his chance on the particular act of which complaint is made, or by ascertaining whether the employer owed the employee any duty in relation thereto. While the first may be the more convenient, the last is the more logical, as it would seem inquiry should be directed to ascertaining the existence of an obligation, before investigating its possible breach. The employee undertakes the performance of duties and services for compensation, and in

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doing so takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal assumption, the compensation is adjusted accordingly. *Farwell v. Corporation*, 4 Metc. (Mass.) 49, 55, 38 Am. Dec. 339. That is, he engages to perform work under certain conditions. If these are not changed, no duty on the part of the master has been omitted. For instance, if he undertakes to operate defective machinery, the master owes him no duty to repair. In such a case there is no waiver of liability, because none has arisen. But if he knew nothing of the defects, and they were not obvious, the law implies the obligation of the master to put it in safe condition for use. As said in *O'Maley v. Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161: "The doctrine of assumption of risk of his employment by an employee has usually been considered from the point of view of a contract, express or implied; but, as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim, '*volenti fit non injuria*.' One who, knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation, without right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible for the danger. If there is a failure to do his duty according to a high standard of ethics, there is, as between the parties, no neglect of legal duty."

Nor can we approve of the distinction attempted to be drawn between employment under conditions condemned as dangerous at the common law, and those prohibited by a city ordinance. In the absence of an assumption of the risk, an omission of a duty implied by law is precisely as effective in fixing liability as though enjoined by statute. The obligation of the employer to the servant is no greater in the one case than in the other, and we can discover no sound reason for the discrimination which declares the danger in the one case may be assumed, and in the other may not. That advanced in two cited cases, to the effect that permitting the employee to waive the protection of a statute would be in contravention of sound public policy, we regard as untenable. The law implied is quite as much for his benefit, as that enacted by the city council. If he knows and appreciates the danger, and understands his rights under the statute, there is no more reason for putting him under the guardianship, and prohibiting him from waiving lapses in duty of obedience to a rule established by an ordinance or statute, than to one which the principles of justice and public policy raise, independent of legislation, for his protection. Beyond the right of action

accruing for the violation of the master's obligation, regardless of its source, is the punishment the state inflicts for the violation of the penal ordinance. The remedies are distinct, and the failure of the servant to demand his private remedy does not interfere with the exaction of a penalty by the state; nor, on the other hand, will the omission of the state to prosecute furnish the slightest obstacle to the maintenance of an action by the injured party. As said in the work from which we have already quoted: "It is difficult to see why, if the servant is given an action, he cannot barter it away before the cause of action accrues, as well as fail to bring it when he suffers injury. In neither case is the master's liability to the state affected, and the state ought not to call in the aid of an individual to enforce a policy it is competent itself to protect. For many reasons, the servant may prefer to forego the protection; and as this does not change the master's obligation under the statute, or affect the welfare of the state, it should be permitted. The means of protection, through information to the proper authorities, are at hand, if the servant or another chooses to avail himself of them; and, if he is content to work without safeguards which he has a right to expect, the loss should be his. \* \* \* If the decisions quoted are to be followed, the odd state of affairs will exist,—of a man who is merely careless being barred, but one deliberately undertaking a dangerous work recovering." Some stress is laid on the impolicy of allowing persons to waive obedience of an ordinance or statute. It would seem quite as inimical to the public good to permit a workman to take advantage of the master's failure to obey the law to which he has consented, as to permit the master to avoid liability because the servant connived with him in such disobedience, by agreeing to work with the conditions as they existed, and according to the method mutually adopted. In other words, it is quite as obnoxious to public policy, independent of the penalty imposed, for the employee to aid and encourage the employer in his disregard of an ordinance, as for the employer to violate it. Our study of the subject has led to the conclusion that, in the matter of assumption of risks, it is immaterial whether they arise from the violation of a common-law duty, or an obligation imposed by statute. As directly in point, see *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367; *Carpet Co. v. O'Keefe*, 25 C. C. A. 220, 79 Fed. 900; *Keenan v. Illuminating Co.*, 159 Mass. 379, 34 N. E. 366; *Dresser, Employers' Liab.* § 116. Also see 13 Law Mag. & Rev. 9; 3 Elliott, R. R. § 1345; *Electric Co. v. Allen* (Ala.) 13 South. 8, 20 L. R. A. 457; *Ford v. Railway Co.*, 106 Iowa, 85, 75 N. W. 650. In the first of the above cases, the court, speaking through Bartlett, J., in referring to the claim that public policy required the rigid enforcement of a particular statute, and that this would be contravened by permitting an employee by contract to waive its protection, said: "We think this proposi-



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tion essentially unsound, and proceeds upon theories that cannot be maintained. It is difficult to perceive any difference in the quality and character of a cause of action, whether it has its origin in the ancient principles of the common law, in the formulated rules of modern decisions, or in the declared will of the legislature. Public policy in each case requires its rigid enforcement, and it was never urged in the common-law action for negligence that the rule requiring the employee to assume the obvious risks of the business was in contravention of that policy. \* \* \* The rule as to risks of service or ordinary risks is entirely distinct from the rule of obvious risks, and, if the statute has added to the duties which the law enjoins upon the employer before the servant can be subjected to the rule of ordinary risks, then the default of the employer in the discharge of this statutory duty, resulting in the injury to the employee, would enable the latter to sue. Such a construction of the statute would not in any way limit the doctrine of obvious risks. \* \* \* We are of opinion that there is no reason, in principle or authority, why an employee should not be allowed to assume the obvious risks of his business, as well under the factory act as otherwise. There is no rule of public policy which prevents an employee from deciding whether, in view of increased wages, the difficulties of obtaining employment, or other sufficient reasons, it may not be wise and prudent to accept employment subject to the rule of obvious risks. The statute, indeed, contemplates the protection of a certain class of laborers, but it does not deprive them of their free agency and the right to manage their own affairs." The appellant urges that as, under our statute, contracts exempting the company from liability are void, there can be no assumption of such a risk. The answer to this is, as already remarked, that in such a case no liability arises, and hence there is none from which the contract exempts. Possibly ordinances or statutes might be so framed as to prevent any assumption of risk, but certainly this is not true of an ordinance general in its terms, limiting the speed of trains in a particular locality. And it can make no difference whether the statute relates to the condition of the place where the work is to be done, or the method to be pursued in performing it. If the employee, with full knowledge of either, undertakes to accomplish the task assigned at the place or in the method proposed, he ought not to be permitted to complain, when conditions and methods were precisely as he knew they would be, and to which he has assented.

2. The finding that deceased assumed the risk of injury from the excessive rate of speed within the corporate limits of the city of Davenport leads inevitably to an approval of the court's ruling in directing a verdict for defendant. It appears to have been deceased's duty to be on top and near the front of the train until the semaphore was reached. After



that it was customary to go to the engine. At the next station the helper engine was usually uncoupled and returned, though it frequently went as far as Turnout, 3.6 miles beyond Farnam. But two witnesses observed deceased shortly before the accident. Staffenbiel, a policeman, testified that he saw the train east of Marquette street, and noticed the head brakeman on top, about six cars from the engine, going forward. McMullen, the rear brakeman, testified: "I stayed on top till near the semaphore. \* \* \* I saw Mr. Flanagan's light about the time I got to the semaphore. It was near the head end of the train. I could not tell how far from the engine. The light was higher up than it would be if it was setting on the car. I could not see the head end of the train, for smoke and steam which came directly back over the train. \* \* \* I was on top till the engine got by the semaphore at Southwest Junction." He then went to the caboose. The appellee rightly insists, as we think, that the only reasonable inference to be drawn from the testimony is that deceased fell while attempting to step from the fourth to the third car in going forward to the engine. The latter was a foot lower than the former, and he may have lost his balance in stepping down, possibly not noticing the difference, in the dark and smoke from the engine. From the place where Staffenbiel saw him, he would likely have reached the end of the fourth car in an ordinary walk, while the train was moving, to the point where he fell. The position of the light when last seen by McMullen obviates the inference suggested by appellant that he was sitting down, and he would not be likely to fall where he did when standing still. But whether he fell while attempting to step to another car, or while standing or sitting near the end, there is nothing in the record tending to explain the cause of the fall. It was still dark, with the smoke and steam trailing close to the train. The weather was cold, and rendered more disagreeable by the humidity of the atmosphere. But these were conditions which deceased was bound to anticipate when taking employment as brakeman. Whether they had anything to do with the accident can never be known. The jury could have found that the train was moving at from 12 to 30 miles an hour, but it is utterly impossible to say from the evidence that going faster than 12 miles an hour, with which deceased was familiar, caused him to fall, and that this would not have happened if moving at a less speed. If the cars swayed in passing over the blocks and switches, he knew that fact better than any one else, and ought not to have attempted to go to the engine until these were passed. Recovery must be had, if at all, because of negligence in the rate of speed. Compliance with the ordinance having been waived by deceased, in not only consenting, but assisting in operating defendant's trains at a rate of from 8 to 12 miles an hour, there is no liability, unless it can be said that the speed at which this train run, above that mentioned, was not only

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negligence, but that it was the operating cause of the injury. As the speed above that mentioned, the risks of which he had assumed, cannot be said to have occasioned his death, we need not inquire whether defendant was negligent, independent of the violation of the city ordinance.

The ruling of the district court is approved, and its judgment affirmed.

WEAVER, J., concurs in the result.

### UNION EL. R. CO. v. NIXON.

(*Supreme Court of Illinois, Oct. 25, 1902.*)

[65 N. E. Rep. 314.]

#### Contract to Procure Property Owner's Consent to Construction of Elevated Railroad—Compensation.

In assumpsit to recover an extra compensation for services rendered in procuring the consents of property holders to the erection of an elevated railroad, evidence *held* to support a finding that plaintiff's right to extra compensation was conditioned merely on procuring the consents, and not on securing them without compensation, instructions.

Where a requested instruction stated a correct proposition of law as applied to certain alleged facts, but the court found that the facts did not exist, the refusal of the instruction was not error.

#### Contract to Procure Property Owner's Consent to Construction of Elevated Railroad—Bonus.

Plaintiff contracted to aid in procuring the consents of adjacent property holders to the erection of an elevated railroad loop,—such consents being necessary to obtain the passage of an ordinance authorizing the loop; and it was stipulated that he should receive a bonus "in case the company was successful, and his efforts helped in securing the legal amount of frontage." One side of the loop was completed when the contract was made, and ordinances authorizing the construction of the other sides were obtained at different times and in conjunction with various other companies: *held*, that the contract could not be construed to make plaintiff's right to receive the bonus conditional on the passage of an ordinance granting the right to build the entire loop, but that he was entitled to the bonus on completion of the loop, though no one ordinance authorized the construction of all of it.

#### Same—Public Policy.

A contract to use personal influence to obtain the consents of property holders necessary to enable a city council to pass an ordinance authorizing the construction of an elevated railway is not opposed to public policy.

#### Action on Contract.

In an action on a contract fully executed, so that nothing remains to be done except the payment of money, it is not necessary to declare specially, but a recovery may be had under the common counts in assumpsit.

#### Appeal—Review.

The appellate court's finding of fact is conclusive on the supreme court.

#### Appeal from appellate court, First district.

Action by Wilson K. Nixon against the Union Elevated Railroad Company. From a judgment of the appellate court.

(99 Ill. App. 502) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Clarence A. Knight and William G. Adams, for appellant.  
Bentley & Burling, for appellee.

HAND, J. This is an action of assumpsit, brought by the plaintiff in the circuit court of Cook county against the defendant to recover for services rendered the defendant in procuring consents to the erection of an elevated railroad loop on certain streets in the business center of the city of Chicago from the owners of real estate fronting upon said streets. The declaration consists of the common counts. The general issue was filed, a jury was waived, and a trial had before the court, which resulted in a finding and judgment in favor of the plaintiff for \$5,937.50, which was affirmed by the appellate court, and a further appeal has been prosecuted to this court.

It appears from the evidence that, prior to the employment of the plaintiff, the Lake Street Elevated Railroad Company, the Metropolitan West Side Elevated Railroad Company, the Chicago & South Side Rapid Transit Railroad Company, and the Northwestern Elevated Railroad Company were each operating, or proposing to erect and operate, an elevated railroad in the city of Chicago, and that they each desired to construct or procure the construction of an elevated railroad loop in the downtown district of the city of Chicago whereby the termini of their railroads might be connected; that the defendant, the Union Elevated Railroad Company, was incorporated with a view to construct such elevated railroad loop; that a contract was entered into between defendant, the Union Elevated Railroad Company, and the four elevated railroad companies above mentioned, whereby it was agreed that the defendant, the Union Elevated Railroad Company, should apply to the city council of the city of Chicago for an ordinance authorizing the construction by it of an elevated railroad loop within said district, for the purpose of effecting the connection of the downtown termini of said four railroads; that so soon as such ordinance should be passed by the city council, and accepted by the defendant, the Union Elevated Railroad Company, it should proceed to construct such elevated railroad loop, and upon the completion thereof the defendant, the Union Elevated Railroad Company, should execute a lease of said elevated railroad loop to said four elevated railroad companies, granting them the exclusive, common, and equal use thereof; that the defendant, the Union Elevated Railroad Company, entered upon such undertaking; that the ordinance or ordinances necessary to authorize the construction of said elevated railroad loop could not be passed by the city council except upon the petitions signed by the owners of land representing the one-half of the frontage of the street or streets, or parts thereof, upon which the said elevated railroad loop was to be erected; that, in order to



obtain such consents, the defendant, the Union Elevated Railroad Company, in the month of December, 1894, entered into an agreement with the plaintiff to assist in procuring such consents, for which it agreed to pay him \$500 per month for the time which he should devote to such service, and in case the defendant, the Union Elevated Railroad Company, was successful, and the efforts of the plaintiff had helped in securing the legal amount of frontage, to pay him the further sum of \$5,000 within 30 days after the passage and acceptance of the ordinance. The plaintiff immediately entered upon such service, and remained in the employ of the defendant, the Union Elevated Railroad Company, for 11 months, during which time he procured the consents of numerous property owners along the line of the proposed elevated railroad loop, and was paid at the rate of \$500 per month to November 30, 1895; and it is for the recovery of the additional \$5,000, and interest from June 26, 1896, at 5 per cent., that this suit is brought. Prior to June 26, 1896, the necessary number of consents were obtained, either by the defendant or other companies to whose rights it has succeeded; and the entire elevated railroad loop was completed, and owned and operated as a single system by the defendant, the Union Elevated Railroad Company, for a considerable length of time prior to the bringing of this suit. The defendant, the Union Elevated Railroad Company, upon the hearing submitted to the court certain propositions, which the court declined to hold as the law of the case, and the refusal of the court to so hold is assigned as error.

1. The court was requested to hold that the obtaining of a sufficient number of consents to authorize the passage of the ordinance authorizing the construction of said elevated railroad loop without the defendant, the Union Elevated Railroad Company, being obliged to make compensation therefor to the property owners, was a condition precedent to the right of the plaintiff to recover. This holding is predicated upon the claim of the defendant that the undisputed evidence in this case is that the plaintiff was to receive from the defendant, the Union Elevated Railroad Company, \$500 per month for his services in soliciting petitions, and was also to receive a bonus of \$5,000 if the company was successful in securing sufficient petitions to authorize the passage of the ordinance desired, without being obliged to make compensation therefor to the property owners. The contract of employment was not in writing, but rested in parol. The plaintiff testified, in substance, that a Mr. Kerfoot came to him, and stated that he was employed to get consents from the property owners, allowing defendant, the Union Elevated Railroad Company, to construct its road upon certain streets in the city of Chicago, and asked him if he would not like to be employed in the same way. He said he would, and agreed to call upon Mr. Louderbeck, the representative of the company. He did

so, and Mr. Louderbeck asked him if Mr. Kerfoot had explained what was wanted. He replied that he had. Mr. Louderbeck then offered to pay him \$500 a month for his services, and \$5,000 additional in case of success, which offer he accepted. The following letter was read to Mr. Louderbeck upon his cross-examination, and he admitted that he had written the same: "Chicago, December 22, 1894. W. K. Nixon, 85 Dearborn St., City—Dear Sir: So there may be no misunderstanding in the future, I hereby reduce our agreement to writing: The Union Elevated Railroad Company will pay you at the rate of \$500 per month for such time as may be necessary, in their judgment, commencing December 22, 1894; you to use your best efforts during such appointment to obtain the signatures of property owners to their consent for the building of the proposed loop. In case the company is successful, and your efforts have helped in securing the legal amount of frontage, within thirty days after the passage and acceptance of the ordinance you are to receive the further sum of \$5,000. Yours truly, D. H. Louderbeck, President." Mr. Louderbeck, who was called as a witness upon behalf of the defendant, the Union Elevated Railroad Company, in referring to the interview with the plaintiff at the time of his employment, says: "The substance of the conversation was that Mr. Nixon, being well acquainted with property owners in Chicago, could help to secure their frontage for the company without expense other than such compensation as we might arrange to give him; and on that basis I arranged with him at that time that in case the Union Elevated Railroad Company was successful in getting the loop, and he contributed to that success, we would pay him \$500 per month, and later on, in case of success in obtaining the loop, \$5,000." The claim, therefore, that the undisputed evidence showed that the necessary consents were to be obtained without the company being obliged to make compensation therefor to the property owners is not sustained by the record. There was a disagreement between the plaintiff and Mr. Louderbeck as to the terms of the agreement, and, the plaintiff's version thereof being fully corroborated by the letter of Mr. Louderbeck, we think the court was fully justified in finding, as it must be held to have found (which finding of fact, having been approved by the appellate court, is binding upon this court), that the agreement of employment did not contain the qualification that the consents were to be obtained without the company being obliged to make compensation therefor to the property owners. If, therefore, it be conceded that the proposition as submitted stated a correct proposition of law, based upon the testimony of Mr. Louderbeck alone, and should have been given, still, as the court properly held the testimony of Mr. Louderbeck overcome by the testimony of the plaintiff and the letter of Mr. Louderbeck, and found the facts different from those upon which the proposition was based, the



error in refusing to hold such proposition to be the law, if error it was, is not reversible error, as it worked no injury to the defendant, as, had the court held the law as asked by the defendant, it would have availed it nothing, as the facts upon which it was based were held against it. We are therefore of the opinion the court did not err in refusing the first proposition submitted by the defendant.

2. The court was requested to hold that the passage of an ordinance granting the right to the defendant, the Union Elevated Railroad Company, to build the entire line of the elevated railroad loop, was a condition precedent to plaintiff's right to recover. The plaintiff was to receive the further sum of \$5,000 "in case the company is successful, and your efforts have helped in securing the legal amount of frontage." We cannot agree with the contention of the defendant that the success of the company, upon which the right of the plaintiff to receive his extra compensation depended, was the passage of an ordinance allowing it to build the entire line of the elevated railroad loop, but think the success referred to in the agreement of employment was the successful completion of the enterprise upon which the defendant was just entering,—i. e., the successful completion of the elevated railroad loop; and if the company has attained that end, and the plaintiff's efforts have contributed toward that end, by helping to secure the required amount of frontage, he is entitled to recover the increased remuneration. The Lake street side of the loop was completed at the time the contract of employment was made. It could not, therefore, have been intended that the plaintiff's extra compensation was dependent upon the company's acquiring an ordinance for the north side of the loop. The enterprise upon which the defendant, the Union Elevated Railroad Company, had entered, was the building of the elevated railroad loop. In its own name it obtained the ordinance for the Wabash avenue side of the loop, and constructed the road on the east side. By an agreement with the Lake Street Elevated Railroad Company, it acquired all the rights of that company to the structure on Lake street, and thereby acquired the north side of the loop. In connection with the Northwestern Elevated Railroad Company, it obtained an ordinance on Fifth avenue. This ordinance was assigned to the defendant, and it constructed thereunder the west side of the loop. In connection with the Union Consolidated Elevated Railroad Company, it obtained the necessary consents on Van Buren street. These consents were used in obtaining the ordinance upon Van Buren street, which was afterwards transferred to the defendant, under which the defendant constructed the south side of the loop, and thereby completed the entire loop system in accordance with its original undertaking; and the enterprise, upon the success of which the payment of the extra compensation to the plaintiff depended, was successfully carried out by the

defendant. We are therefore of the opinion that the court did not err in refusing the second and third propositions submitted by the defendant.

3. The court was requested to hold that the contract sued on was opposed to public policy, and therefore invalid, by reason of the fact that the payment of the extra compensation to plaintiff was contingent on the passage of an ordinance permitting the construction of said elevated railroad loop. While, by the terms of the contract, as stated in the letter of Mr. Louderbeck, the extra compensation was not to be paid plaintiff until the ordinance permitting the use of the streets by the elevated railroad loop had been passed and accepted, it was not contemplated thereby that the plaintiff was to secure the passage of the ordinance. The ordinance could only be passed by the city council, based upon the necessary consents; and, while the plaintiff was employed to obtain consents, he was not employed to deal with the city council, but with the property owners. The obtaining of consents was legitimate, and the employment of the plaintiff legal; and we fail to see how the action of the plaintiff in obtaining consents can be said to be contrary to public policy by reason of the fact alone that he was to be paid extra compensation for such services after the ordinance permitting the improvement had been passed. While a contract to obtain the passage of an ordinance, or an agreement to use personal influence upon the members of a city council to secure the passage of an ordinance, would be void, as against public policy, because, under our system of law and morals, influence to be exercised over a legislative body to secure the passage of a law or an ordinance cannot legally be made the subject-matter of contract, a contract to obtain consents from the property owners abutting upon streets upon which improvements are to be made (payment for such services to be made after the ordinance permitting such improvement shall be passed) would not, when, as here, the persons obtaining such consents had nothing to do with the legislative body or the passage of the ordinance, make the obtaining of such consent contrary to public policy, so that the person obtaining such consents could not recover the compensation agreed to be paid him therefor. The contention of the defendant proves too much, as, carried to its logical conclusion, every contract made by the defendant prior to the passage of the ordinance or ordinances under which the elevated railroad loop was finally completed would be void, as all of such contracts were made in contemplation of the fact that an ordinance or ordinances would be passed by the city council permitting the use of the streets of the city for the construction of its loop. The cases relied upon by the defendant (*Crichfield v. Paving Co.*, 174 Ill. 466, 51 N. E. 552, 42 L. R. A. 347, and *Marshall v. Railroad Co.*, 16 How. 314, 14 L. Ed. 953, and other cases cited in its brief) are based upon agreements to render services in influencing

legislation, and are distinguishable from the case at bar, and are not in point. We are therefore of the opinion that the court did not err in refusing the fourth proposition submitted by the defendant.

4. It is assigned as error that the court held that there could be a recovery in this case under a declaration consisting only of the common counts. The contract was fully executed, and nothing was left to be done by the defendant but to pay the money. In *Sands v. Potter*, 165 Ill. 397, 46 N. E. 282, 56 Am. St. Rep. 253, on page 407, 165 Ill., page 285, 46 N. E., 56 Am. St. Rep. 253, we say: "While a contract continues executory the plaintiff must declare specially, but when it has been fully performed on his part, and nothing remains to be done under it except for the defendant to pay, the plaintiff may, at his election, declare generally in *indebitatus assumpsit*. *Lane v. Adams*, 19 Ill. 167; *Throop v. Sherwood*, 4 Gilman, 92; *Tunnison v. Field*, 21 Ill. 108; *Adlard v. Muldoon*, 45 Ill. 193." A recovery was therefore properly allowed under the declaration.

5. It is also assigned as error that the court held that the plaintiff was entitled to recover interest. There is some evidence in the record tending to show unreasonable and vexatious delay in payment of the claim, and the finding of the appellate court upon that question, as a question of fact, is conclusive upon this court, and we cannot disturb the finding.

Finding no reversible error in this record, the judgment of the appellate court will be affirmed. Judgment affirmed.

COMMONWEALTH *ex rel.* ELKIN, ATTY. GEN., v. UWCHLAN ST. RY. CO.

(*Supreme Court of Pennsylvania, Oct. 13, 1902.*)

[53 Atl. Rep. 513.]

**Street Railways—Extension—Exclusive Rights.**

Where a street railway company is organized after Act June 7, 1901 (P. L. 514), and has determined on an extension, and has had the resolution adopted by it recorded, and has filed an exemplification of this record with the secretary of the commonwealth in compliance with the terms of the act, it is immediately invested with an exclusive privilege in the streets covered by such extension; and section 4 of the act, providing that no right to actually construct the extension shall vest until after 30 days from the filing of such exemplification, merely postpones the right to construct the extension for such 30 days.

**Same—Same—Same.**

Where a street railway company organized under Act June 7, 1901 (P. L. 514), has complied with the law so as to acquire an exclusive privilege in a street for the purpose of an extension, during the 30 days which must elapse before it can begin the construction under the act, if a second company is chartered to construct a railway over the same streets, its charter is invalid.

## Commonwealth v. Uwchlan St. Ry. Co

Use of Tracks of Another Company—Constitutionality of Statute.\*

Act May 14, 1889 (P. L. 211), § 14, as amended by Act June 7, 1901 (P. L. 514), authorizing a street railway company to use the track of another company for certain prescribed distances, is unconstitutional.

Appeal from court of common pleas, Chester county.

Quo warranto by the commonwealth, on the relation of John P. Elkin, attorney general, against the Uwchlan Street Railway Company. Judgment for relator, and defendant appeals. Affirmed.

The writ was as follows: "To the Sheriff of Said County, greeting: We command you that you summon the Uwchlan Street Railway Company so that it be and appear before our court of common pleas to be holden at West Chester, in and for the said county of Chester, on October 28th next, and then and there to show by what authority it exercises within the said county the liberties and franchises following, to wit, of a street railway company, under its articles of association and letters patent issued thereon on July 10, 1901, and to show cause why said letters patent should not be declared void; and give you then and there this writ."

Verdict directed for plaintiff. New trial was refused, and judgment entered on the verdict; Butler, J., filing the following opinion:

"In this action the commonwealth of Pennsylvania seeks a forfeiture of defendant's charter, urging that it was voidable when granted; that it was issued in direct antagonism to the following prohibition contained in the first section of the railway act of June 7, 1901 (P. L. 514): 'But whenever a charter, after the approval of this act shall be granted to any corporation to build a road as provided by this act, no other charter shall be granted to any other company to build a road on the same streets, highways, bridges or property, shall be granted to any other company.' The following undisputed facts were developed at the trial: On June 10, 1901, under the above-recited act and the railway act of 1889, to which it is a supplement, a charter issued to the Coatesville & Downingtown Railway Company to construct a road over a route including Brandywine avenue, a street extending from the southern limits of the borough of Downingtown, north to Lancaster avenue, a distance of about 2,600 feet. On June 26, 1901, an exemplification of the record of an extension by the Coatesville & Downingtown Railway Company over Wallace avenue, a street extending from the terminus of Brandywine avenue at Lancaster avenue to the northern limits of the borough, a distance of about 2,600 feet, was filed in the office of the secretary of the commonwealth. On July 10, 1901, a charter was issued to defendant to construct a road over a route including Wallace and Brandywine avenues. The Coatesville & Downingtown Railway Com-

See notes appended to Crescent City R. Co. v. New Orleans & C. R. (La.), 4 Am. & Eng. R. Cas., N. S., 402.



pany promptly sought municipal consent to the construction of its road, but has failed to obtain that of the borough of Downingtown. The defendant has secured the requisite consent from the borough, and has proceeded to construct its road. When the evidence was in, plaintiff's counsel asked for binding instructions against the defendant on the ground that under the language of the act of assembly and the facts above recited the defendant's charter was issued in violation of law, and was, therefore, void. Counsel for the defendant suggested that, as the questions involved would be fully discussed and considered on motion for new trial, he did not care to make an argument in opposition to plaintiff's request for binding instructions, and was content that the court should act on plaintiff's motion in accordance with the impressions it might entertain. A verdict was therefore directed against the defendant.

"In support of its motion for a new trial the defendant urges that when, on July 10, 1901, its charter issued, the Coatesville & Downingtown Railway Company did not possess a charter to build a road over Brandywine and Wallace avenues; that while the charter of that company issued on June 10th immediately secured to it the right to occupy Brandywine avenue the amendment to the charter route, the exemplification of the record of the extension over Wallace avenue filed in the office of the secretary of the commonwealth on June 26th, was ineffectual to secure that avenue to the Coatesville & Downingtown Company until after the expiration of thirty days or until after July 26th,—a date subsequent to that upon which the defendant received its charter. The defendant, depending upon this proposition, contends that its route over Wallace and Brandywine avenues coincided with that previously secured by the Downingtown & Coatesville Company only upon Brandywine avenue, a distance of about 1,600 feet, and, claiming that under the act of 1901 a coincidence of routes not in excess of 2,500 feet is permitted, urges that the issuance of its charter was not in violation of the prohibition contained in the act of 1901. Can the provision found in section 4 of the act of 1901, 'and no right to actually construct the same [the extension] shall vest until after thirty days from the filing of said exemplification,' be construed, as counsel for defendant has urged it should be, as deferring for thirty days not only the right to 'actually construct,' but also the vesting of a franchise in the route covered by the extension filed? The section under consideration gives to any company incorporated under the act authority to adopt extensions, and as requisite to the establishment of an extension, exacts no more of such company than that its resolution to extend over a route described shall be recorded in the appropriate recorder's office, and that an exemplification of this record shall be filed in the office of the secretary of the commonwealth. When a company has resolved upon an extension, has had it



resolution recorded, and has duly filed an exemplification of this record, it has done everything required of it to establish an extension, and is, we think, immediately invested with a franchise, with an exclusive privilege in the streets covered by the extension. It is only the 'right to actually construct' the extension which is deferred for thirty days after the date of filing the exemplification. The prohibition to construct the extension for thirty days was introduced probably to secure a period within which, in advance of the streets being actually occupied by the extension, opportunity would be afforded for investigating the validity of the extension; so that, in case it should be successfully attacked within the period for some informality or substantial unsoundness, the streets would be protected from incumbrance. As before stated, however, the legal adoption of an extension is consummated with the filing of the exemplification, and the franchise in the extension route must then immediately arise. In *Hannum v. Railway Co.*, 200 Pa. 44, 49 Atl. 789, the court says: 'Undoubtedly a company having a charter route and legally adopted extensions may begin the construction at any point most convenient to itself. \* \* \* There are here a trunk franchise and branch franchises.' This language of the supreme court is quoted as showing that a company secures its trunk (its main line) franchise when its charter is granted, and that it secures its extensions, or branch franchises, when it has (as soon as it has) 'legally adopted' them. A provision in the act of 1901 that there should be no actual construction of the charter road until thirty days after the issuance of the charter could not be held to mean that no franchise, no exclusive privilege in the charter route, would attach for thirty days. Neither can the provision that is in the act of 1901, prohibiting the 'actual construction' of the extension for thirty days, be held to mean that no franchise, no exclusive privilege, in the 'legally adopted,' extension route attaches for thirty days.

"The provision at the end of the section under consideration, 'that no extension or branch shall be constructed on any street or highway upon which a track is laid \* \* \* under any existing charter, at the time of the filing of such exemplification,' etc., is in itself a clear indication that a railway company's right to appropriate streets for an extension of its route depends upon conditions existing 'at the time of the filing' of the exemplification, and that when, 'at the time of the filing' of the exemplification, no obstacle to the adoption of the extension exists, the extension franchise over the streets covered instantly arises. To give to the prohibition to construct an extension until thirty days after filing the exemplification the effect claimed for it by the defendant, would be to defeat the controlling scheme and purposes of the act of 1889 and its supplements. The policy of the commonwealth, as reflected in our street railway legislation, is that not more

than one company shall be permitted to occupy a street. If, as is contended in behalf of the defendant, a company secure no franchise in the route of its extension until thirty days after its legal adoption, and consequently a second company, during the thirty days, can legally secure a charter covering the same route as the extension, then the way is open for two companies to obtain rights to build roads upon the same streets at the same time. At the end of thirty days the company that legally adopted an extension will be authorized to construct that extension, and the company incorporated during the thirty days with a coincident route will be authorized to occupy the same streets. Applying the defendant's contention to its situation and that of the Coatesville & Downingtown Company, the result above pointed out is exemplified. On June 26th the Coatesville & Downingtown Company legally perfected the adoption of an extension over Wallace avenue. Neither within the thirty days next ensuing nor since was any attempt made to question the validity of the extension; nor can it be doubted that, in so far as the state could give authority, this company was invested with a right after thirty days from June 26th, to 'actually construct' its road on Wallace avenue. During these thirty days the defendant secured its charter to construct a road over Wallace avenue. If defendant's proposition be true, that during the thirty days the Coatesville & Downingtown Company had no franchise in its extension route which precluded the lawful issuance of defendant's charter, then has the state authorized both the Coatesville & Downingtown Company and the defendant company to build roads on Wallace avenue at the same time. Such a situation, we are clear, is not intended by the law, and the defendant's contention that during the thirty days immediately following the Coatesville & Downingtown Company's adoption of the extension over Wallace avenue the defendant could lawfully be invested with a charter franchise to occupy that avenue is manifestly opposed to the obvious design of existing railway legislation that the streets and highways of the commonwealth shall not be occupied by more than one company at a time.

"What the supreme court say in *Homestead St. Ry. v. Pittsburgh & H. Electric St. Ry.*, 166 Pa. 162, 30 Atl. 950, *Am. & Eng. R. Cas.*, N. S., 97, 98, 27 L. R. A. 383, relative to the status of railway companies with conflicting routes and the state's policy as to the occupancy of streets under the railway act of 1899, applies with equal force since the passage of the supplement of 1901: 'The language of the first section expressly limits even the right of incorporation to such companies only as are formed for the purpose of constructing, maintaining, and operating a street railway on any street or highway upon which no track is laid, or authorized to be laid, or to be extended under any existing charter.' That is, the statutory power of incorporation can only be executed in favor

of a company which will construct and operate a railway on a street or highway upon which 'no track is laid or authorized to be laid' under any existing charter. There can be but one meaning to these words, and that is, if the track is already laid, or even authorized to be laid, on the proposed street or highway, then there can be no incorporation of such company. It cannot come into existence; and, as a matter of course, if a charter should be obtained in such circumstances, it would be simply nugatory. It could confer no power in hostility with the law of its creation. It seems to us that there can be no more convincing proof than this that it is the settled, fixed policy of the commonwealth, as determined by this legislation, that there shall be no more than one lawfully authorized street passenger railway track laid upon the same street or highway at the same time.

"As the result of a careful consideration of the position taken by the defendant's counsel, we are unable, for the reasons given, to sustain his contention. We are of opinion that, immediately upon the Coatesville & Downingtown Railway Company filing the exemplification of the record of its extension over Wallace avenue, a franchise over that street vested in the company, by virtue of which at the end of thirty days it had the state's authority to 'actually construct' the extension. This being true, no charter could lawfully issue after June 26th, the date of filing the exemplification, to another company, to build a road upon a route including Wallace avenue. As we find that the routes of the two companies are coincident over Wallace avenue, about 2,600 feet, as well as over Brandywine avenue, about 1,600 feet, in all approximately 4,200, it is not necessary to determine whether a coincidence of routes not in excess of 2,500 feet is sanctioned, as claimed by the defendant, or whether, as urged by the plaintiff, it is unlawful, since the passage of the act of 1901, to incorporate a company with a route at all conflicting with that previously secured by an already existing company.

"The defendant's second and final proposition in support of its motion for new trial is that, if the law did not sanction the issuance of its charter, if through mistake its charter was granted in violation of law, the state is powerless to recall it; that the defendant had a right to presume, when it obtained and paid for its charter, that it was lawfully issued, and advantage could not now be taken by the commonwealth of any error committed by its agencies. We are unable to subscribe to this doctrine. The agencies of the state, representing the people, could confer upon the defendant only such franchises as the laws made by the people's representatives sanctioned. The defendant took its charter with knowledge that, if it was issued contrary to law, it was a nullity. The defendant and the commonwealth's agents were alike absolutely subject to the law and conditions controlling the issuance of the charter, and the defendant company was as powerless

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to take any advantage against the state, under a charter issued in hostility to the law of its creation, as were the state agents powerless to give such a charter any life. That the state can successfully demand the cancellation of a charter not authorized by law, whether the charter was issued wholly outside the provisions of any act of assembly, or whether, under legislation providing for the granting of such a charter, it was issued in direct and substantial antagonism to the provisions of such legislation, is not, we think, open to doubt. 'We are in no doubt of the power of the court to revoke the alleged charter. It never was a charter. It was not authorized by any act of assembly, and is absolutely void. Had it been authorized by the act of 1874, it could only be reached by a quo warranto. But a void charter confers no rights, and the court below was justified in revoking the order which gave it an apparent validity.' In *re National Indemnity Endowment Co.*, 142 Pa. 450, 21 Atl. 879. Prior to July 10, 1901, the Coatesville & Downingtown Railway Company by virtue of its charter route and legally adopted extension had a charter—had franchises—from the state to build a road over Brandywine and Wallace avenues, a distance of about 4,200 feet. This being true, then under the unequivocal language of the acts of assembly by virtue of which the defendant took its charter the issuance of that charter on July 10, 1901, purporting to authorize the building of a road over a route including Wallace and Brandywine avenues, was expressly forbidden, and what is said in the opinion of the court in *Homestead St. Ry. v. Pittsburg & H. Electric St. Ry.*, supra, exactly declares the resulting status of the defendant: 'There can be but one meaning to these words, and that is, if a track is already laid, or even authorized to be laid on the proposed street or highway, then there can be no incorporation of such company. It cannot come into existence; and, as a matter of course, if a charter should be obtained under such circumstances, it would be simply nugatory. It could confer no power in hostility with the law of its creation.' While the defendant's charter purports to be a grant by the state of certain franchises, it is in fact, for the reasons given, a mere nullity, and the state is entitled to have it forfeited.

"In determining the issue here framed between the Commonwealth and the defendant, we have not been unmindful of the fact that a decision adverse to the defendant may, in the present situation, cause it serious injury, and may retard the construction of a railway between points which the community is interested in having connected. For these reasons the questions presented by this litigation have been considered with more than ordinary care by both members of the court, and the conclusion to dismiss the motion for new trial has been reached only after mature deliberation has resulted in the conviction that no error was committed in instructing the jury to render a verdict in favor of the Commonwealth.

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"The rule to show cause why a new trial shall not be granted is dismissed."

Argued before McCOLLUM, C. J., and DEAN, BROWN, MESTREZAT, and POTTER, JJ.

J. Frank E. Hause, for appellant.

George Quintard Horwitz, John P. Elkin, Atty. Gen., Albert B. Kelley, and Thomas W. Pierce, for the Commonwealth.

PER CURIAM. Under the general railway act of 1889 and supplements, a charter was issued June 10, 1901, to the Coatesville & Downingtown Railway Company to construct its road, on a route including Brandywine avenue, in Downingtown, to Lancaster avenue, a distance of 1,600 feet. On June 26, 1901, an exemplification for an extension on Wallace avenue to the northern limits of the borough, a distance of 2,600 feet, was filed in the office of the secretary of the commonwealth. On July 10, 1901, the appellant, the Uwchlan Railway Company, took out a charter to construct its railway on a route including two of the same streets already taken by appellee,—Brandywine and Wallace avenues. The appellant failed to obtain immediately the consent of the borough of Downingtown to occupy the two streets. The appellee did obtain such consent. The commonwealth suggesting that the Uwchlan Railway Company had no authority, under the facts, to a location on these streets, at her instance this quo warranto was issued. At the trial the court below pro forma directed a verdict for plaintiff, reserving the right to consider the legal question involved on a motion for a new trial. After full argument of this motion, the learned trial judge directed judgment to be entered on the verdict. His reasons in the opinion filed are ample and convincing, and on that opinion we affirm the judgment. He very clearly shows that the whole policy of street railway law heretofore has been to prevent conflict as to routes on the streets between rival companies by prohibiting any incorporation of a company to adopt a street on which a track is laid or authorized to be laid. *Homestead St. Ry. v. Pittsburg & H. Electric St. Ry.*, 166 Pa. 162, 30 Atl. 950, 1 Am. & Eng. R. Cas., N. S., 97, 98, 27 L. R. A. 383. As to the argument that under section 14 of the act of 1889 and the amendments thereto in the acts of 1895 and 1901 authority is given to even appropriate 2,500 feet of the rails laid on the same street or highway, it is sufficient to say that in *Petition of Philadelphia, M. & S. St. Ry. Co.* (Appeal of Chester, D. & P. Ry. Co.) 53 Atl. 191 (argued February 10, 1902, opinion handed down this day), we have declared the amendments to that section of the act unconstitutional.

The judgment is affirmed.



## LOUISVILLE &amp; N. R. CO. v. STEENBERGER.

(Court of Appeals of Kentucky, Oct. 17, 1902.)

[69 S. W. Rep. 1094.]

**Injury to Passenger—Negligence of Servants—Appeal—Review.\***

Where, in an action for injuries to a passenger, in which it was alleged that the upper end of his elbow was fractured by the brakeman's striking it with a footboard, the evidence was very conflicting as to whether the fracture was so caused, a verdict for plaintiff will not be disturbed on appeal.

**Same—Instructions.**

Where, in an action for injuries to a passenger, there was no proof that the injury was an unavoidable accident, but the entire evidence was directed to the question whether the brakeman in fact struck the plaintiff with a footboard and fractured his elbow, an instruction that if the plaintiff was being carried as a passenger, and an employee of the defendant, while engaged in performing his duties, struck plaintiff on the elbow, thereby inflicting any injury, the jury should find for plaintiff in damages, was not objectionable on the ground that it made defendant liable for the injury without regard to the question of negligence.

Appeal from circuit court, Lincoln county.

"Not to be officially reported."

Action by J. D. Steenberger against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. W. Alcorn and B. D. Warfield, for appellant.

Robt. Harding and R. C. Warren, for appellee.

HOBSON, J. Appellee was a passenger on one of appellant's trains from Glasgow to Crab Orchard, Ky. As they approached the tunnel on Muldraugh's Hill, the brakeman came in with a footboard ordinarily used to light lamps in the coach. He placed the footboard upon the arms of two opposite seats, and got upon it to light the lamp. According to the evidence of appellee, he hurriedly left the car after lighting the lamps, and threw his board under a seat. In doing this, appellee claims, the brakeman struck him on the crazy bone of his elbow with the board, as his arm was resting on the arm of his seat next to the aisle, fracturing the bone and inflicting a very painful injury. The proof for the defendant tended to show that the plaintiff was not struck by the board, and that his arm was hurt before. The physicians who dressed his arm show clearly that the bone was fractured and that the nerve was injured; and there are some circumstances in the case from which the jury were warranted in concluding that, although plaintiff's arm had been sore before, the fracture occurred on this trip. The evidence was very conflicting. There was a verdict for the plaintiff for \$400, and we do not think we ought to disturb it, under the proof, on the ground that it is against the evidence.

\*As to the liability of carriers to passengers for the negligence of servants, see note at end of case.

The court instructed the jury that if, while the plaintiff was being carried as a passenger on defendant's train, an employee of defendant, while engaged in performing his train duties, struck plaintiff on the elbow with a footboard, thereby inflicting any injury on him, they should find for him in damages. It is earnestly complained that it was error for the court to make the defendant liable for the injury, without regard to the question of negligence, and it is urged that the court should have submitted the question of negligence on the part of the brakeman in handling the footboard. It was the duty of the defendant to carry its passengers safely. If a lamp or any part of the car had fallen upon him, it would be *prima facie* negligence for which it would be liable. When it assigns a passenger a seat, it is its duty to carry on the necessary operations of its train without injury to the passenger. In *Thomp. Neg.* § 2754, the rule is thus stated: "But when the plaintiff has sustained and discharged this burden of proof [that is, has shown that he was injured, and connected the defendant with the injury] by showing that the injury arose in consequence of the failure, in some respect or other, of the carrier's means of transportation, or the conduct of the carrier's servants, then, in conformity to the maxim, '*Res ipsa loquitur*,' a presumption arises of negligence on the part of the carrier or his servants." In section 2760, he says: "The same presumption arises where an injury proceeds from an act or omission of the servants of the carrier, and operates to shift the burden upon the carrier." In the case before us there was no proof that the injury was an unavoidable accident. On the contrary, the entire evidence was directed to the question whether the brakeman in fact struck the plaintiff with the footboard, and there was nothing, therefore, but this question to be submitted to the jury.

The plaintiff had taken the deposition of S. H. Compton, a passenger who was sitting by his side in the same seat at the time of his alleged injury. Compton lived more than 30 miles from the county seat where the trial took place. The defendant, however, had Compton present at the trial, and objected to the plaintiff's reading his deposition. The court allowed the plaintiff to read the direct examination from the deposition, and then allowed the defendant to put the witness on the stand and cross-examine him before the jury. This is earnestly complained of, but we do not see that there was any substantial prejudice of the defendant's rights, for the reason that the cross-examination of the witness before the jury covered the whole ground, and he only stated that he heard the plaintiff complain of being hurt, but did not know whether he was struck by the footboard or not.

It is also complained that the plaintiff was allowed to introduce evidence of his good character. This would have been improper if the defendant had not assailed his character, but on the cross-examination of Dr. Doores, a witness for the

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plaintiff, the defendant had shown that plaintiff's character for truth was not "first-class." After this evidence was brought out by the defendant, the court properly allowed the plaintiff to introduce evidence sustaining his character.

On the whole case, we see no substantial error to the prejudice of appellant. Judgment affirmed.

NOTE.

**Carriers of Passengers—Liability for Negligence of Servants.**

Although a carrier of passengers has exercised due care in the selection of his servants and has no knowledge of their incompetency (Bishop v. Stockton, Fed. Cas. No. 1,440, affirmed in 45 U. S. 156, 11 L. Ed. 918; Grand Rapids, etc., R. Co. v. Ellison, 117 Ind. 234, 20 N. E. 135, 39 Am. & Eng. R. Cas. 480; Gillenwater v. Madison, etc., R. Co., 5 Ind. 339, 61 Am. Dec. 101), he is liable to passengers who are damaged by their negligence (Philadelphia, etc., R. Co. v. Derby, 55 U. S. 468, 14 L. Ed. 502; Doyle v. Boston, etc., R. Co., 82 Fed. 869, 27 C. C. A. 264; Peck v. Neil, 3 McLean [U. S.] 22, Fed. Cas. No. 10,892; Alabama, etc., R. Co. v. Sinlard, 123 Ala. 557, 26 So. 689; Black v. Carrollton R. Co., 10 La. Ann. 33, 63 Am. Dec. 586; Koetter v. Manhattan R. Co., 5 Hun [N. Y.] 623, 13 N. Y. Supp. 458, affirmed, without opinion, in 12 N. Y. 668, 30 N. E. 65), when acting within the scope of their employment. Sherman v. Hannibal, etc., R. Co., 72 Mo. 62, 4 Am. & Eng. R. Cas. 589, 37 Am. Rep. 423; Lakin v. Oregon, etc., R. Co., 15 Ore. 220, 15 Pac. 641; Missouri, etc., R. Co. v. Perry, 8 Tex. Civ. App. 78, 27 S. W. 496; International, etc., R. Co. v. Armatrong, 4 Tex. Civ. App. 146, 23 S. W. 236. And he is not relieved of liability because the particular act was not authorized or ratified by him (Louisville, etc., R. Co. v. Kelly, 92 Ind. 371, 47 Am. Rep. 149; Terre Haute, etc., R. Co. v. Jackson, 81 Ind. 19, 6 Am. & Eng. R. Cas. 178; Gillenwater v. Madison, etc., R. Co., 5 Ind. 339, 61 Am. Dec. 101), or because the servant may have exceeded his detailed instructions. Gray v. Boston, etc., R. Co., 168 Mass. 20, 46 N. E. 397. The carrier is liable even though the particular act causing the injury was done in disregard of the general orders or special command of the carrier. Philadelphia, etc., R. Co. v. Derby, 55 U. S. 468, 14 L. Ed. 502; Heenrich v. Pullman Palace Car Co., 10 Sawy. (U. S.) 80, 20 Fed. 100, 18 Am. & Eng. R. Cas. 379; Lak Shore, etc., R. Co. v. Brown, 123 Ill. 162, 178, 14 N. E. 197; Fitzsimmons v. Milwaukee, etc., R. Co., 98 Mich. 257, 57 N. W. 127; Lackawanna, etc., R. Co. v. Chenewith, 52 Pa. St. 382, 91 Am. Dec. 168; Redding v. South Carolina R. Co., 3 S. Car. 1, 16 Am. Rep. 681. The result of the authorities, then, is that the liability of the carrier for the negligence of his servants depends, not upon whether the particular act was authorized, nor even upon whether it was forbidden, but upon whether the servant was, when he caused the injury, acting within the line of his duties or the scope of his employment.

THEODOR MEGAARDEN.

**NEAL v. WILMINGTON & N. C. ELECTRIC RY. CO.**

(Superior Court of Delaware, New Castle, Feb. 13, 1902.)

[53 Atl. Rep. 338.]

**Negligence—Questions of Law and Questions of Fact.**

What constitutes negligence is a question of law, but whether negligence exists in a particular case is a question of fact.

**Electric Railways—Fallen Wires—Degree of Care.**

Where a guy wire supporting an electric trolley line fell and became charged with electricity, and defendant company had notice thereof it was its duty to exercise such care to prevent injury as a reasonable prudent man would exercise under the circumstances, considering the



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dangerous character of the wire, the existing conditions, and surrounding circumstances.

Required of Traveler on Highway.

A traveler on a highway is entitled to assume that it is reasonably safe, and, while required to use reasonable care and caution to avoid danger, is not required to search for obstructions and dangers therein.

Proximate Cause.

Where the proximate cause of the death of plaintiff's intestate was defendant's negligence in permitting a guy wire to fall into a street and become charged with electricity, it was immaterial that the negligence of some third person may have contributed to the accident.

Death by Wrongful Act—Measure of Damages.\*

The measure of damages for the wrongful killing of plaintiff's intestate is such a sum as deceased would probably have earned in his business during his life, and left as his estate, considering his age, his ability and disposition to labor, and his habits of living and expenditures.

Action by William H. Neal, as administrator of Harry Neal, deceased, against the Wilmington & New Castle Electric Railway Company for the wrongful killing of plaintiff's decedent. Verdict for plaintiff.

Argued before LORE, C. J., and PENNEWILL and ROYCE, JJ.

William S. Hilles, Robert H. Richards, and David Reinhardt, for plaintiff.

James W. Ponder and Charles M. Curtis, for defendant.

PENNEWILL, J. (charging jury). In this case the plaintiff, William H. Neal, administrator of Harry Neal, deceased, seeks to recover for the defendant, the Wilmington & New Castle Electric Railway Company, damages for the death of said Harry Neal, which death was caused, the plaintiff alleges, by the negligence of the defendant company. It is averred by the plaintiff that a guy wire that was connected with and formed a part of the defendant's railway, and which served to hold the main trolley wire in position, was on the morning of November 26, 1900, found to be broken and lying in or along the public highway at Guthrie's switch; that said guy wire had come in contact with a live wire and was charged with electricity, and that, although a motorman of one of the defendant's cars has notice early in the morning of that day of the condition of said wire, the defendant negligently permitted the same to remain for several hours in the highway in such manner and position that the said Harry Neal, while lawfully walking in or along the highway at said switch, came in contact with the wire and was killed thereby; and that he said Harry Neal was at the time of the accident free from any contributory negligence. Such is the contention of the plaintiff. The defendant company contends that it was not guilty of any negligence that was the proximate cause of the accident; that as soon as possible after notice, and before the accident to Harry Neal, a servant of the company removed

\*See foot-note appended to Ft. Worth & R. G. Ry. Co. v. Sivells (Tex. Civ. App.), 3 R. R. R. 927, 26 Am. & Eng. R. Cas., N. S., 927.

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the wire from the road and pathway, across the briers and bushes, and into a ditch, so that it was no longer in a dangerous position, and that it (the said company) exercised the care and prudence that was required under the law or that was demanded for the safety of the public. The defendant further contends that the accident was caused by the contributory negligence of the said Harry Neal, who, it contends, was playing, romping, and carelessly proceeding in said road or by the act of some one other than the defendant. The said defendant therefore denies that it is in any way liable for the death of said Neal.

With the facts, gentlemen, that you have heard from the witnesses, the court have nothing to do. The evidence is for your consideration and determination, applying thereto the law as we shall declare it to you. This action is based on negligence, and it is proper that we should explain to you what negligence, in legal contemplation, is. It has been defined by this court to be the want of ordinary care; that is, the want of such care as a reasonably prudent and careful man would exercise under like circumstances. What constitutes negligence is a question of law for the decision of the court, but whether negligence exists in the particular case is a question of fact for the determination of the jury. It is therefore for you to determine from the evidence in this case whether there was any negligence on the part of the defendant that caused the death of Harry Neal.

Negligence is never presumed, but must always be proved to the satisfaction of the jury, and the burden of proving it rests upon the plaintiff. The defendant can be held liable only for such negligence as constituted the proximate cause of the injury. And we also say to you that contributory negligence, like all other negligence, cannot be assumed. It must be proved to the satisfaction of the jury to have existed, in order to exempt the defendant from liability on that ground.

A railway company is bound, under the law, to operate and manage its road and property with ordinary care and diligence. But the terms "ordinary care and diligence" must be understood to import all the care, prudence, and diligence which the peculiar circumstances of the case, the conditions existing and instruments employed, reasonably require, as such as a reasonably prudent and careful man would exercise under like circumstances. The care and prudence required will be increased or diminished according as the ordinary liability to danger and accident, and to do injury to others, is increased or diminished in the operation and use of the railway. Or as has been said by this court in another case where the injury was caused by contact with an electric wire: "In such cases the law requires that usual and ordinary care should be used, which, in such a business as this is operated, required and demanded a degree of care and diligence proportionate to the danger or mischief that was liable to ensue. The words 'usual and ordinary care' mean in such



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cases nothing more or less than, if there be great danger and hazard in the business, there should be a corresponding degree of skill and attention required by the law." *Cook v. Electric Co.*, 9 Houst. 306, 32 Atl. 643. It was the duty of the defendant company to exercise reasonable care and diligence in removing the wire that caused the death of Harry Neal from its dangerous position, and reasonable care in such case would be such care as a reasonably prudent man would have exercised under the circumstances, considering the dangerous character of the wire, the conditions existing, and all the surrounding circumstances surrounding it. It is for you to say whether the defendant did exercise reasonable care under all the circumstances of the case.

But it is also a well-settled principle of law that the person injured is bound to use ordinary care, prudence, and diligence to avoid the accident which occurred to him, and the care and diligence which he is bound to exercise must be in proportion to the danger to be avoided: that is to say, he is bound to use such care, prudence, and diligence as a reasonably prudent man, under the peculiar circumstances of the case, would exercise to preserve himself from being injured.

It is admitted that the defendant company was, at the time of the accident, operating the railway of which the wire that caused the death of Harry Neal formed a part; and it is not denied that the accident occurred in the public highway. A traveler on such highway has a right to assume that the same is in a reasonably safe and passable condition. And while it is not his duty to be searching for obstructions or dangers, nevertheless the law imposes upon him the duty to employ his natural and ordinary senses, and use all reasonable care and caution, to avoid danger.

If you shall believe from the evidence that the proximate cause of the death of Neal was the negligence of the defendant, it is immaterial that the negligence of some third person, if any such exists, may have in some way contributed to the accident.

If you believe from the preponderance of the testimony in this case that at the time of the accident the defendant was not exercising "ordinary care and prudence," as we have defined those terms to you, and that such negligence was the proximate cause of the death of Harry Neal, and shall also believe that said Neal was free from any negligence on his part that contributed to the accident, your verdict should be for the plaintiff. But if you are not so satisfied, your verdict should be for the defendant. If you find in favor of the plaintiff, your verdict should be for such a sum as you believe from the evidence the deceased would probably have earned in his business during his life, and left as his estate, taking into consideration the age of the deceased, his ability and disposition to labor, and habits of living and expenditures. In this the

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jury should be governed by the reasonable rules governing human experience in the acquisition and retention of property under the circumstances and environments surrounding such a life.

Verdict for plaintiff for \$450.

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**PAYNTER v. BRIDGETON & M. TRACTION CO.**

*(Court of Errors and Appeals of New Jersey, June 16, 1902.)*

[52 Atl. Rep. 367.]

**Injury to Passenger—Presumption of Negligence.**

A mere fall from a street car, without any evidence to show how the fall was occasioned, raises no presumption of negligence on the part of the operators of the car.

**Res Ipsa Loquitur.**

The doctrine of *res ipsa loquitur* is applicable only when the thing shown speaks of the negligence of the defendant, not merely of the happening of the accident.

(Syllabus by the Court.)

**Error to supreme court.**

Action by Bell Paynter against the Bridgeton & Millville Traction Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. H. Gaskill, for plaintiff in error.

Walter H. Bacon, for defendant in error.

**GARRETSON, J.** The plaintiff brought suit against the defendant to recover damages for personal injuries alleged to have been caused by the negligence of the defendant. A verdict was rendered for the plaintiff.

The plaintiff was a passenger upon the defendant's trolley car. She testifies: That, as she neared her destination, she heard the bell ring for the car to stop. She looked up to see if the conductor rang for her, and he bowed to indicate that he did, and she arose to leave the car. She waited a moment for the car to stop. She waited a moment, when she arose, and then stood on the threshold of the car until it had fully stopped; that is, as she says, in the doorway, inside, in the body of the car. Before she stepped on the platform, while she stood there, she turned and smiled good night to two ladies in the car, and after that she stepped on the platform and was about to alight; and while she was in the act of alighting she was thrown to the ground. That she did not reach the ground standing upright on both her feet. That the first she knew she was on her feet, and some one was holding her up. That she did not know who picked her up. It must have been either Mr. Laning (a passenger and witness in the case) or the conductor. Both were beside her when she regained consciousness. That she did not get off the car in safety and then fall down. That she did not get off the car in safety and

her ankle turn under her. In response to a question, "What was it that caused you to become separated from the car?" she answers, "I thought the car—" when she was stopped from further answering by objection. On cross-examination she testifies that she remembered the car stopping while she was on her feet after she arose from her seat, and it came to a full stop before she went on the platform; and her cross-examination then proceeds as follows: "Q. There was nothing in the motion of the car at the time you got up out of your seat, or the time you reached the back door and stepped on the platform, that attracted your attention? A. Anything that attracted my attention? Q. Yes; in the motion of the car? A. I can't say that there was particularly. Q. Now the car did not start again until after you had fallen, did it. A. I am not allowed to say what I think? Q. No; you are not allowed to say what you think, but only what you remember,—what you know. A. I remember stepping out on the platform. Q. Yes; but pardon me. (Former question repeated.) A. I think it did. Q. Are you positive? A. Well, I was so soon unconscious. Q. Before you became unconscious, can you say that the car started from the time you got up out of your seat up to the time that you found yourself on the ground? A. I believe it did. Q. I didn't ask you what you believed. I asked you if you say that the car started? A. Well, I can only answer you what I have already said. Q. Well, you are unable to say that the car started, are you not? You can't say that the car started? A. I think the car started. Q. But you can't say that it did start? A. I can only answer you as I have. Q. You don't remember it starting? Put it that way. A. I am afraid I don't remember much that occurred just then. Q. You don't remember the car starting at any time after you left your seat and at once come to a stop, do you? I am asking for your recollection now. A. Well, whether it is recollection or whether it is feeling, it seems to me the car started. Q. Do you say that you distinctly recollect the car starting after you had left your seat and before you found yourself on the ground? A. I don't know. I really don't positively know. I had a feeling. Something threw me. I don't know what. Q. You don't remember any sudden jar or jolt of the car, do you? A. Just at that time? Q. Yes; after you had left your seat and before you found yourself on the ground? A. I didn't find myself on the ground. I was so quickly removed, my memory was so quickly taken from me, that I can't answer that. Q. Well, to the time you fell on the ground? A. I can't answer to the time I fell on the ground. Q. I say you can't remember any sudden jolt or jar, or sudden motion of the car, from the time you left your seat up to the time you became unconscious, you say? A. I have no recollection of anything, except that I was in the act of alighting from the car, and the next I knew is some one had picked me up. Q. And as you were in the

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act of alighting from the car, which you distinctly remember, you don't associate with it any recollection of any motion or jar or jolt of the car? A. I have no distinct associations. Q. Did you fall on your back. A. I don't know, sir. I have been told that I fell on my back."

Isaac Laning, who was a passenger in the car and was called as a witness on the part of the plaintiff, testifies that he saw the plaintiff when she arose to leave the car; that he arose and followed right after her; that she went out of the car on the platform; that he was only a few steps behind her; that he saw her after she had left the car, and she was then on the ground, lying flat on her back, with her head in the direction toward the front of the car, and the car slightly passed her; that when he left his seat in the car, and started toward the exit, the car was then in motion; that when he got to the platform he don't know whether it had stopped; that the car, as a matter of course, started after he left, and it was moving as he approached the door, but when it stopped he could not tell. He says, on cross-examination, that so far as he recollects the plaintiff, from the time she got up, kept in motion walking, until he saw her on the ground; that he does not know whether the car stopped before she attempted to get off; that he has no recollection of the car coming to a standstill before she got off; that he was not conscious of any act excepting walking and coming to the front of the door, seeing the plaintiff on the ground, and jumping to pick her up; that he had no recollection whatever of any starting of the car which caused the fall; that when he saw her on the ground she was lying flat upon her back, with her head toward the front of the car; that the rear platform, when the car stopped, had passed her head slightly as she lay on the ground on her back; that there was only one stopping of the car, and one starting after it stopped, it did not start again until after the plaintiff was picked up and the conductor got back again in the car and then they resumed their journey; that he was not conscious, when the car stopped, of its stopping with any unusual or peculiar jolt or jar or lurch.

Mrs. Carpenter, a passenger and witness for the plaintiff testifies that after the plaintiff got up, and as she was going toward the door, the car stopped; that she thought, when the plaintiff passed out on the platform, the car had stopped; that the car stopped quite a long time, and she heard them ask if some one was hurt. On cross-examination she says that when the plaintiff arose the car was in motion, but she stopped a second in front of the witness, and then started toward the door, but it had stopped by that time; that after the plaintiff got up and started to go out she does not remember whether the car started again until after she heard some one say, "Are you hurt?" that she has no recollection of the car starting again until it started to move again on to where she was going; that she is sure the car stopped before the plaintiff got

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on the platform; that she only remembers of the car stopping once; that she don't remember whether, when it stopped, it stopped smoothly and quickly; that she don't recall any jerk or lurch or jar, or remember any unusual movement or motion of any kind there, that evening, at all like a jerk or jar, or a sudden start or sudden stop.

The mere happening of the accident is not sufficient to place legal responsibility for its effects upon the defendant. There is no evidence on the part of the plaintiff showing how the accident happened. She herself says that she has no recollection of anything, except that she was in the act of alighting from the car, and the next she knew was some one picked her up. There is nothing in her testimony, nor in that of her witnesses, nor in the attendant circumstances, to show how it happened that she fell. She merely has a belief, a thought, a feeling, a seeming to her that the car started; but, when pressed to say whether she remembers any sudden jolt or jar, or sudden motion of the car, she says, "I have no recollection of anything, except that I was in the act of alighting from the car, and the next I knew some one picked me up." Surely there is no proof in this testimony that the fall was occasioned by the sudden, or any other, starting of the car from a state of rest, or by any unusual motion, jerk, jar, or jolt of the car which the defendant was called upon to explain. In *Hansen v. Railway Co.*, 64 N. J. Law, 686, 46 Atl. 718, the court reversed a judgment on a verdict directed for the defendant on the ground that the facts proved might justify a jury in inferring negligence on the part of the defendant. In *Whalen v. Traction Co.*, 61 N. J. Law, 606, 40 Atl. 645, 41 L. R. A. 836, 68 Am. St. Rep. 723, it was testified that the plaintiff was pulled off the run board of the car by the conductor. In *Fielders v. Railway Co.* (N. J. Sup.) 50 Atl. 533, the plaintiff was injured by stepping into a hole in the street, which it was claimed the defendant should have repaired. In *Traction Co. v. Thalheimer*, 59 N. J. Law, 474, 37 Atl. 132, the evidence was that the plaintiff was thrown from the platform of the car by a sudden lurch or jerk. In *Scott v. Traction Co.*, 63 N. J. Law, 407, 43 Atl. 1060, affirmed in 64 N. J. Law, 362, 48 Atl. 1118, a lurch forward of the car while the plaintiff was alighting was proved. In *Bliss v. Traction Co.*, 64 N. J. Law, 601, 46 Atl. 624, injury was caused to an employee by wrong signals. In *Fenig v. Railway Co.*, 64 N. J. Law, 715, 46 Atl. 602, the car was started when the plaintiff had one foot on the ground and the other on the car. In *Railroad Co. v. Williams*, 61 N. J. Law, 646, 40 Atl. 634, the car was started suddenly while the deceased was alighting at a crossing where a stop had been made. In *Foley v. Traction Co.* (N. J. Err. & App.) 50 Atl. 340, the case turned upon the question of the liability of the company for the condition of the street where the car stopped for a passenger to alight. In all these cases facts were proved of acts



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by the employees of the company, or of movements of the cars or appliances of the company, from which the jury might infer negligence; but in this case no such facts appear in the evidence. The mere happening of the accident raised no presumption of the negligence of the defendant. It was necessary to show by direct evidence that the defendant was responsible for the accident, or to show the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant, and would exclude the idea that it was due to a cause with which the defendant was unconnected. *Electric Co. v. Nugent*, 58 N. J. Law, 658, 34 Atl. 1069, 32 L. R. A. 700; *Houston v. Traphagen*, 47 N. J. Law, 23; *Benedick v. Potts* (Md.) 40 Atl. 1067, 41 L. R. A. 478.

A fall while alighting from a street car is not such a fact, standing alone, as to authorize the application of the doctrine of *res ipsa loquitur*. The thing that happened in no way can be said to prove that the defendant was negligent. The only thing proved was the fall. Nothing was proved causing the fall, or any circumstances which could be in any way said to show that the defendant was negligent. If it had been proved that a jerk or jolt of the car had produced the fall, that fact, unexplained, might be said to prove the defendant's negligence, although the defendant might furnish an explanation of it which would relieve from responsibility. These principles are very fully discussed in the case of *Benedick v. Potts*, supra, by Chief Justice McSherry of the Maryland court of appeals.

The application for a nonsuit at the close of the plaintiff's case should have been granted. This determination renders it unnecessary to consider other errors assigned upon exception taken to the refusal to direct a verdict for the defendant, to portions of the charge of the court, and to the refusal of the court to charge the several requests of the defendant.

The judgment below will be reversed.

### GRATZ *et al.* v. HIGHLAND SCENIC R. CO.

(*Supreme Court of Missouri, Division No. 1, Nov. 19, 1901.*)

[65 S. W. Rep. 223.]

#### Right of Way—Construction of Deed—Conditions Subsequent—Forfeiture.

A deed conveyed to a railroad company, "subject, however, to the faithful performance of this agreement," the right to construct a railroad through certain land. It stipulated, among other things, that natural drains were to be preserved, and that planked crossings were to be constructed, the conveyance being "upon condition, however, that the grantee" shall construct and maintain an electric railway, "and upon the failure or abandonment of said enterprise \* \* \* that the privilege herein and property hereby conveyed shall revert to and be fully vested in the grantors": *held*, that a failure by the railroad company to construct the plank crossings, or to do any of the other collateral acts required by the first portion of the contract, did not work a forfeiture of the right of way, the only forfeiture being conditioned on a failure to construct or maintain the electric railway.

Gratz v. Highland Scenic R. Co

Appeal from circuit court, St. Louis county; Rudolph Hirzel, Judge.

Ejectment by Laura C. Gratz and others against the Highland Scenic Railroad Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

James A. Seddon and James L. Blair, for appellants.

A. N. Edwards, Dawson & Garvin, and Leonard Wilcox, for respondent.

VALLIANT, J. This is an action in ejectment to recover a strip of land through which is a railroad, which at the commencement of this suit was in the possession of and operated by defendant. The land is embraced in a right of way granted by the plaintiffs to the St. Louis & Kirkwood Railroad Company, upon which that company constructed its railroad, and which at the commencement of this suit was in the possession and use of the defendant as lessee under plaintiffs' grantee, but pending the suit the lease has expired, and the Kirkwood Company has resumed its possession and is operating the road. The right of way granted was through land of plaintiffs in or near Kirkwood, and the plaintiffs ground their right of recovery on the proposition that the grant was on conditions subsequent, which have been broken by the grantee, and for the breaches plaintiffs have in due form declared the forfeiture and demanded possession. The case turns chiefly on the construction that should be placed on the deed granting the right of way. That deed is as follows: "Contract for right of way, entered into between Laura B. Gratz and Anderson Gratz, her husband, of the town of Kirkwood, St. Louis county, Missouri, parties of the first part, and the Kirkwood & St. Louis Railroad Company, a corporation of the state of Missouri, party of the second part, witnesseth: For and in consideration of one dollar in hand paid, the receipt of which is hereby acknowledged, the parties of the first part hereby sell and transfer to the party of the second part, its assigns and successors, subject, however, to the faithful performance of the terms of this agreement, the right to build, maintain, and operate a railway over and through a certain tract of land [description], said right of way to be so used as not to interfere with the remaining rights of the first parties to use the property, whether as a street or for other purposes. No trees are to be cut on said right of way unless said trees interfere with the construction or operation of said road. Natural drains to be preserved by ample culverts, bridges, or trestles, except that in the westerly half of said property the party of the second part may direct the creek into ditches not to be confined to the right of way. All surplus earth, if any, to be deposited at any point designated by first party within three hundred feet of a place of excavation. Proper cattle guards to be constructed by second party at each entrance to property. Proper level and planked crossings to be constructed

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by second party at two points to be designated by the first party. No construction camps or other nuisance to be allowed on the right of way, and no crossing or trespassing to be allowed on any other part of the property. Entire right of way to be maintained by second party in a clean and decent condition, free from all nuisances. The party of the second part agrees that in case a street or streets should be dedicated including the right of way, that they will operate and maintain this section of their railroad in the way provided, and subject to all the conditions of the ordinance of the town of Kirkwood granting them the right of way through the streets of said town, upon condition, however, that the grantee herein, its successors and assigns, shall construct and maintain a single or double track of railroad, to be operated by electricity for motive power, or by such other approved power as may be adopted by the grantee or assigns; and upon the failure or abandonment of said enterprise by the grantee herein or its successors or assigns, that the privilege herein and the property hereby conveyed shall revert to and be fully vested in the grantors, their legal representatives or assigns; and conditioned also that the construction of such road be fully completed and such road be in operation in or before the year 1896." The cause was tried by the court, jury waived. There was evidence on the part of the plaintiffs tending to show that the railroad as constructed impaired the use of the strip as a street; that no cattle guard was constructed; that although the plaintiffs designated two crossings, yet the railroad company made only one, and that one not planked or made level; that the rails were laid on ties above the surface as in ordinary steam railroads; that at the crossings which the railroad company did construct the roadbed was graded so that it was necessary in passing over it to go up and down a considerable embankment; that at the other place designated by plaintiffs for a crossing not only was no crossing made, but a switch with high guard rails was put in, which rendered it impracticable for a crossing, and plaintiffs were compelled to make another road to town from their property. The railroad was constructed within the time specified in the deed, and is in continuous operation. This strip is midway between the main termini of the road, and that part of the railroad on this strip is necessary to the operation of the road. At the close of the plaintiffs' case defendant interposed a demurrer to the evidence. The court took the case under advisement, and subsequently rendered a finding for defendant on the issues joined, and a judgment accordingly. Plaintiffs appeal.

The trial court, in a memorandum of its findings and opinion, said that the railroad company had failed "to construct cattle guards, and also failed to construct and plank over certain crossings, and for these failures and omissions the plaintiffs claim a forfeiture, and the right of possession of said right

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of way. Plaintiffs' counsel present quite an able and learned argument to maintain their position, but the fact remains that the contract does not provide for a forfeiture on account of these omissions, and no forfeiture can be construed unless so provided in the contract, and no action of ejectment will lie in this state for a breach of a condition subsequent. See *Provolt v. Railroad Co.*, 57 Mo. 256; *Baker v. Same*, Id. 265; *Hubbard v. Railroad Co.*, 63 Mo. 68; *Kanaga v. Railroad Co.*, 76 Mo. 210; *McClellan v. Railroad Co.*, 103 Mo. 295, 15 S. W. 546. It would seem from the authorities that plaintiffs' remedy consists in an action for damages, but they cannot maintain an action in ejectment." The learned discussion in the briefs before us on this appeal is directed chiefly to the second proposition in the above quotation; that is, that ejectment will not lie against a railroad corporation in such case for a breach of a condition subsequent. But, if the learned trial judge was correct in his first proposition,—that is, that the contract in question "does not provide for a forfeiture on account of these omissions,"—the case is disposed of before we reach the second proposition. Where the terms of a contract are left open to construction, and the question is, do they amount to a condition subsequent or to a covenant, the inclination should be to hold it a covenant. A condition that works a forfeiture is not favored, and the law will not presume that it was intended, if the terms used can as reasonably be construed to mean a covenant. 4 Kent, Comm. (14th Ed.) pp. 129, 132; *Studdard v. Wells*, 120 Mo. 29, 25 S. W. 201. It is the same principle which underlies the doctrine that a clause in a contract will not be construed as providing for forfeiture in the form of liquidated damages, when the consequence is out of proportion to the wrong suffered, and a just estimate of compensation can be reasonably made. In construing the contract we must say what the parties really intended by the language used, and the language must be understood to have been used in reference particularly to the subject about which the parties were contracting. If, therefore, we adopt the appellants' construction of this contract, we must say that the parties, by the language used, intended to say that, if the railroad company failed to perform any one of the several things it agreed to do, this segment of its road should be cut out, and its business as a carrier of passengers between St. Louis and Kirkwood be brought to an end. The contract denounces a forfeiture for either one of the items specified, as well as for all, if it denounces a forfeiture at all. If a tree was cut down unnecessarily, if a culvert was not large enough, if surplus earth excavated in the grading was not deposited just where plaintiffs designated,—in short, if any one of the numerous requirements was not observed,—a forfeiture would result, if plaintiffs correctly interpret the contract. In that case the result would be unreasonably disproportionate to the wrong intended to be guarded against.



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One of the requirements of the law is that a condition carrying forfeiture must be reasonable. 6 Am. & Eng. Enc. La. 504. A grant may be on a condition subsequent when express words of condition are used, and the intent may be gathered from the whole instrument. Tied. Real Prop. (2d Ed.), § 272; 2 Washb. Real Prop. (5th Ed.) § 2; Chap. v. School Dist., 35 N. H. 435; Gray v. Blanchard, 8 Pick. 20. But the intent to create a condition under which the estate granted may be forfeited must be very clear. It is argued for appellants that this was a voluntary conveyance, that even the nominal consideration of \$1 was shown by the evidence not to have been paid, and never expected by either party to be paid, and therefore the performance of the conditions was the only consideration to support the contract. But the argument is not convincing. The only consideration named was such as \$1, which the parties showed by their conduct did not enter into their calculations at all. There was something else not named, that moved the plaintiffs to make the grant. What was it? Counsel argue that it was the performance of the conditions in question; that was the sole moving cause. It is reasonable to conclude that the plaintiffs, for the sole consideration of having a cattle guard placed at each end and crossings made as designated, would convey a strip 50 feet wide through their grounds? If there was no other fact in the case, what imaginable use could the plaintiffs have for cattle guards and crossings? Clearly, the cattle guards and crossings and the other items specified were mere incidents to the main subject of the contract. The real consideration for the conveyance was so manifest that expression was useless. The construction of an electric passenger railroad through plaintiffs' suburban premises affording communication with the city was a desirable object to attain, and this was undoubtedly the consideration moving to the grant. Having obtained the main consideration, shall the plaintiffs be allowed to effect a forfeiture of the grant because certain mere incidental requirements were not satisfied? Not unless it is expressed or necessarily implied in the contract. The language of the contract relied on by appellants is: "For and in consideration of one dollar in hand paid, the receipt of which is hereby acknowledged, the parties of the first part hereby sell and transfer to the party of the second part, its assigns and successors, subject, however, to the faithful performance of the terms of this agreement, the right to build, maintain, and operate a railway over and through a certain tract of land, etc. Appellants construe the terms, "sell and transfer, \* \* subject, however, to the faithful performance," etc., to mean sell and transfer upon condition that the terms of the agreement be performed. If we were held to a strict grammatical construction, we might find it difficult to class the words "subject to" in their relation to the rest of the sentence. But, syntax aside, it will not be too critical to say that the



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words, in the connection in which they are employed in this contract, are not as apt as the words "upon condition" would have been if they had been intended to express that meaning. They do not necessarily mean what appellants interpret them to mean, and to give them that meaning would do violence to the general interest of the whole instrument, and impose an unreasonable penalty on the offending party. We are satisfied that the parties intended only to say that the grant carried to the grantee the obligation to perform certain acts incidental to the main purpose. That the parties to this contract did not understand the words above discussed as meaning that the performance of the various acts specified in that connection were conditions subsequent for the nonperformance of which the estate granted would be forfeited, is also shown by the fact that further down in the contract it is in express terms declared that the grant is "upon condition" that certain other acts shall be done within a period specified, and, if not done within that time, "the privilege herein and the property hereby conveyed shall revert to and be fully vested in the grantors." Those acts were strictly performed. That shows that the parties were mindful of what they were doing, and knew the difference between a covenant to perform collateral acts and a condition subsequent on which the grant depended. The trial court was right in its construction of the contract, and its judgment is affirmed. All concur.

VAN HUSAN *et al.* v. OMAHA BRIDGE & T. RY. CO.

(*Supreme Court of Iowa, Oct. 29, 1902.*)

[92 N. W. Rep. 47.]

**Deeds—Parol Evidence.**

Parol evidence was not admissible to show that a deed by a railroad company was not intended to convey an embankment and right of way on the land, there being no ambiguity in the deed.

**Same—Estoppel.**

A grantor of land is estopped to claim that he had no title.

**Real Estate—Fixtures on Roadbed.**

An embankment, ties and rails placed by a railroad on land belonging to it are part thereof, and pass to its grantee.

**Deeds—Evidence.**

Various parties claimed title to portions of a tract of land, and an agreement for division and settlement was made, whereby a railroad was to deed a portion of the land to another party. Subsequently the road laid tracks and an embankment on such portion, and thereafter made the deed, but it contained no reservation or exception. The deed referred to the agreement as its consideration, but it was not mentioned in the granting clause: *held*, that the agreement could not be looked to to show that the embankment was not to be conveyed.

**Eminent Domain—Damages.**

On condemnation by a railroad of land occupied by it, damages are to be awarded as of the time of the entry by the railroad.

Appeal from district court, Pottawattamie county; N. W. Macy, Judge.

Condemnation proceedings to assess the amount of damages to which plaintiffs are entitled by reason of the occupancy of a part of their lands by the defendant railway company. From the award made by the district court, plaintiffs appealed. Affirmed.

Gaines, Kelby & Storey and Stone & Tinley, for appellant.  
Wharton & Baird and Harl & McCabe, for appellee.

DEEMER, J. Some time in the fall of the year 1889 the Union Pacific Railway Company commenced the construction of the roadbed in question. At that time the ownership of the land on which the railway was constructed, together with other lands in what is known as the "East Omaha Bottom," was in dispute. The Union Pacific Company, the East Omaha Land Company, and the Nebraska Ferry Company, and Anthony W. Street, its trustee, claimed ownership of portions of the land lying in that bottom; the boundaries of the respective tracks being unknown, and in dispute. Soon after the Union Pacific Company commenced the construction of its roadbed, Street, trustee, commenced action for the purpose of enjoining the railway company from constructing its road over the land now in dispute, claiming that the same was owned by the Nebraska Ferry Company. At the same time an action was pending in the federal courts of Nebraska, in which Street was complainant, and the East Omaha Land Company and others were defendants, the purpose of which was to determine the boundary lines of the several tracts of land, and to quiet the title thereto in the respective claimants. These suits were settled by an agreement signed by all the parties, in which the Union Pacific Company was named as party of the first part, the East Omaha Land Company as second, and the Nebraska Ferry Company as third, party. The material parts of that agreement are as follows: "Whereas, divers controversies and disputes have sprung up between the parties hereto, touching the title to the premises hereinafter described, and a certain bill in equity is pending in the United States circuit court for the district of Nebraska between the said Anthony W. Street, plaintiff, and the East Omaha Land Co., defendant, for the quieting of the title to certain of the said lands in the said plaintiff; and another action is pending in the district court of the state of Iowa for the county of Pottawattamie between the said Street, plaintiff, and the said Union Pacific Railway Company and others, defendants, to restrain the construction by said defendants of a railroad over and upon certain of said lands; and whereas, the said parties have agreed to settle and compromise their said differences as hereinafter set forth: Now, therefore, for the said purposes it is hereby agreed between the parties hereto as follows: (1) The said Street agrees to cause to be dismissed out of said two courts his said two actions above mentioned, and the said defendant in the said action secondly above entitled

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releasing him from all damages on account of the injunction allowed and issued therein. (2) The said second and third parties each for itself, and not one for the other, covenants and agrees to and with the said first party to make to it their several deeds of conveyance of all that certain piece or parcel of land described as follows, that is to say: [Here follows description of lands not in controversy in this action.] (3) The said first and second parties each for itself, and not one for the other, covenants and agrees to and with said third party to make to it, or to such person as it may appoint in that behalf, their several deeds of conveyance of all that certain piece or parcel of land described as follows: [Here follows a description of premises which include the land in question.] (4) The said second party covenants and agrees to and with said third parties to make to such parties as the said Council Bluffs and Nebraska Ferry Company may appoint in that behalf a deed of conveyance of all that certain piece of parcel of land described as follows: [Here follows description of premises not in controversy.] (5) The said third parties covenant and agree to and with said second party to make to said second party a deed of conveyance of all that certain piece or parcel of land described as follows: [Here follows a description of land not in controversy.]" Immediately after the execution of the agreement the Union Pacific Company proceeded with the construction of its roadbed, and completed the same in or about December, 1900. This roadbed consisted of an embankment some six feet high, thrown up from the adjacent soil; and the south side of the embankment was riprapped with stone, to protect it from the ravages of the Missouri river, which, as we understand it, parallels the right of way for nearly its entire length. This embankment also served as a levee or dyke, preventing the overflow of high-water upon the lands owned by all of these parties, which are low and flat. The road was built primarily to furnish trackage and railway facilities for the East Omaha Land Company, which was endeavoring to sell its lands, and to establish manufactures thereon; and was built under some kind of a contract or arrangement, the exact purport of which is not in evidence. By the terms of the settlement to which we have already referred, the Union Pacific Company was to convey the land in controversy, which is occupied in part by the roadbed erected by that company, to the Nebraska Ferry Company, or to A. W. Street as trustee; but for some reason, not fully explained, the deed was not made until December 10, 1892.

As the controlling points in the case turn upon the effect to be given this deed, we here set out the material parts thereof. After reciting the general facts set forth in the instrument of settlement, it recites: "That the said party of the first part (Union Pacific Railway Co.), in consideration of the sum of one dollar, to it in hand paid, the receipt whereof is hereby

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acknowledged, and in further consideration of the premises aforesaid, has granted, bargained, sold, remised, and quitclaimed, and by these presents does grant, bargain, sell, remise, and quitclaim, unto the said party of the second part, his heirs and assigns, forever, the following described real estate: [Being land in controversy herein and other lands together with all and singular the hereditaments and appurtenances thereunto belonging; to have and to hold the above described premises unto the said Anthony W. Street, trustee, his heirs and assigns, so that neither the said Union Pacific Railway Company, nor any person in its name and behalf shall or will hereafter claim or demand any right or title to the said premises, or any part thereof, but that they, and every one of them, shall, by these presents, be excluded, and forever barred. And the said party of the first part hereby specially covenants that the said premises are free from all incumbrance placed thereon by it, and it further specially covenants to warrant and defend the title to the same against any and all persons claiming through or under it, its successors or assigns,"—duly signed and acknowledged December 16, 1892. In the fall of 1892 plaintiffs began negotiations with Street and the ferry company for the purchase of the lands in controversy, with other lands, and on December 30th of that year acquired title thereto from the ferry company by a deed of general warranty. On January 1, 1893, Street also conveyed to the plaintiffs by a like character of deed; but both contained this exception: "Subject to right of way, if any, over said premises, 50 feet wide, now occupied by the tracks of the Union Pacific Railway Company. The deed from the Union Pacific Railway Company was made while the negotiations were pending resulting in the plaintiffs' acquirement of title. It was procured by one John R. Webster, who represented the ferry company. Webster testified, while on the witness stand, that he was endeavoring to clear up the title, and that plaintiffs would not buy the land unless the title was clear. The Union Pacific Company was then in possession of the part of the land covered by its road bed and tracks, and Webster testified with reference thereto as follows: "At the time of the negotiations I went on the land with Mr. Van Huan, and this track with the railroad bankment came up. There was some conversation between us with reference to the ownership of that right of way, and matters of that kind. I could not tell exactly what I said, but my recollection is that I did tell him that we could get a deed from the Union Pacific Railway Company with reference to that. I think I told him of the deed which was already drafted, but had not been executed. The contract for the deed from the Union Pacific had been made some time in December, 1889. The fact is, the Detroit people said, unless they got the right of way, they did not want to purchase. I don't think I can give the words we used, but the Detroit

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syndicate people, represented by Mr. Van Husan, would not make the purchase if the land was going to be divided by a track; and I was anxious, of course, to get something that would suit them, and get them to buy the land, because I was assisting Mr. Potter, and I may have said a good many things there that I forget now." He also testified, with reference to the exceptions in the deed from the Nebraska Ferry Company and A. W. Street, as follows: "I had some difficulty over that clause in those deeds, and I think I probably used the Union Pacific deed to satisfy the syndicate people; that that clause really did not amount to anything. I know I tried to do it at that time." Mr. Van Husan, one of the plaintiffs, testified as follows with reference to this transaction: "I cannot say positively when I first learned anything concerning a claimed mistake in the deed of the Union Pacific people; but it was a long time after we purchased the property, and after the deal was closed. This question of the right of way of the Union Pacific came up on the day of the negotiations for the purchase. We and Mr. Webster went over the land, and we saw the track and embankment there thrown up, and we asked Mr. Webster if that belonged to the land, and Mr. Webster said no, that it did not, that it belonged to the Union Pacific road, and they had put it in there. We asked if they had any rights there, or any permission from the property owners, and he said no. He said they had no rights except by sufferance. We told Mr. Webster that he must procure a deed from the Union Pacific road in this deal, and he said he would. I don't remember now whether he said the deed was drafted, but anyway the deed that has been offered in evidence was the deed he procured in compliance with our request. We bought the land relying on the title that was conveyed there. When the Detroit people purchased the land, they bought it relying upon the title as conveyed by the deeds." It is also shown that after the deed from the Union Pacific Company was obtained Mr. Webster went to that company to have a correction deed executed, and in the conversation with its attorney that official said that when they executed the new deed they should reserve out of it the right of way they were then occupying with their tracks. No new deed was made, but it is shown that the Union Pacific Company knew at that time that the deed it did execute contained no exceptions or reservations. It will be observed in passing that the railway company did not at that time claim that there had been any mistake in the deed, nor is such claim made now. In March of the year 1894 the United States circuit court of Nebraska rendered a decree in an action wherein the Union Pacific Railroad Company was complainant and the East Omaha Land Company and certain railway companies were defendants, wherein it was found that the railway company had no interest in the land on which it had built its tracks, but that it was entitled to reimbursement for money expended in



building the same in the sum of \$85,000; and it was further ordered that upon payment of said sum to the Union Pacific Company or to its receivers the said company will be barred from any right, title, or interest in or to said tracks under the contract aforesaid, and that it shall convey by quitclaim deed all its right, title, or interest therein to a right of way of the width of 100 feet, being 50 feet on each side of the center line of its said track, from the commencement point of said track as hereinbefore described eastward. None of plaintiffs or the grantors were made parties to this action. The amount awarded to the Union Pacific Company was paid. The Nebraska Construction Company, another corporation, undertook to procure from the Union Pacific Railway Company for the benefit of the defendants herein, all its tracks, franchises, rights of way, etc., on and over the lands of the East Omaha Land Company; and this construction company, we understand it, paid the \$85,000 awarded in the decree of the United States circuit court; and, having procured whatever rights the East Omaha Land Company had in virtue of the decree, it transferred the same to the defendant the Omaha Bridge & Terminal Railway Company, which took possession thereof on the 31st day of March, 1894, and has continued to use and occupy the same down to this time. The track, etc., so taken possession of includes that in dispute, which occupies something like 3.54 acres of land, as well as the track running over the lands of the East Omaha Land Company. This proceeding was instituted by defendant for the purpose of condemning this 3.54 acres of land, and the questions arising on this appeal are: First, who is entitled to the roadbed and embankment erected by the Union Pacific Company? and, second, as of what date should damages be assessed?

The value of the roadbed and embankment is stipulated to be \$4,903.45. Defendant contends that it acquired title to the roadbed and embankment in the manner above indicated, and that damages for the land itself should be assessed as of the date of the commencement of the condemnation proceedings, or at any rate not before March, 1894, when it took possession of the property; while plaintiffs contend that it holds title to the roadbed and embankment, as well as the land occupied thereby, in virtue of the deed from the Union Pacific Railway Company to its immediate grantors; and that damages should be assessed from the time the Union Pacific Company originally entered upon the land. The trial court found that defendant was the owner of the roadbed and embankment, and that damages should be assessed as of date March 31, 1894. Should we find that the improvements—the roadbed and the embankment—belong to the plaintiffs, then the decree awarding compensation as of date March 31, 1894, is correct, but to the amount allowed should be added the value of this embankment. On the other hand, if that question

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decided adversely to appellants, then the question of the date at which compensation should be awarded becomes material. From the statement already made it will be seen that the case turns largely, if not entirely, on the effect to be given the deed of the Union Pacific Company under date of December 16, 1892. Incident to that point is the effect to be given the decree of the United States circuit court in the case of the Union Pacific Company against the East Omaha Land Company et al., and the transfer by the latter company or the Nebraska Construction Company to the defendant. The exact terms of that transfer, taken from the records of the construction company, were as follows: "Whereas, an agreement was made between the Omaha Bridge and Terminal Railway Co., then known as the Interstate Bridge and Street Railway Company, and this company, under date of August 1st, 1892, wherein this company agreed to construct and complete for use a bridge across the Missouri river between Council Bluffs, Iowa, and the lands of the East Omaha Land Co., with a draw span 520 feet long, for a double-track railway, on a permanent pivot pier, with detailed specifications, according to plans, etc., and in said contract the construction company did further agree to procure a conveyance from the Union Pacific Railway Co. of all tracks, franchises, and rights of way on the lands of the East Omaha Land Co., and it did further agree to make certain connections between the tracks of the bridge company on the east side of the Missouri river and the tracks of certain other railroad companies as in said contract specified, and also to procure a conveyance of certain lands as in said contract specified; and whereas, this company has performed all its obligations under said contract; and whereas, the said Omaha Bridge and Terminal Co. has caused to be delivered to this company one million of its bonds, secured by a first mortgage, etc., and has delivered to this company seventy-five hundred shares of its capital stock and seventy-five hundred shares of the capital stock of the East Omaha Land Co. in full payment of the consideration of the contract hereinbefore mentioned, and as payment for all the work done, material furnished, and lands purchased and delivered: Now, therefore, this company does hereby acknowledge complete and full satisfaction of said contract, and does hereby authorize and direct John R. Webster, general manager of this company, to turn over and deliver to the Omaha Bridge and Terminal Railway Co. all of said property, lands, tracks, and equipment, together with all material on hand, and all rights and franchises in connection with the same; to have and to hold the same to the Omaha Bridge and Terminal Company, its successors and assigns, forever." It will be noticed that this resolution, which was duly adopted by the corporation, purports to convey only the tracks, franchises, and rights of way on the lands of the East Omaha Land Company, and that

these plaintiffs were not parties to the litigation between the Union Pacific Company and the land company, nor were they in privity with either. The roadbed in question was not built on lands belonging to the East Omaha Land Company, but on the property of the Nebraska Ferry Company, or A. V. Street, trustee, and defendant's title thereto is doubtful, say the least. It admits that it does not own the land on which these improvements were made, and, of course, cannot trace title to the ferry company or to Street. The exact arrangement under which the Union Pacific Company built the embankment is not shown. All that we have with reference thereto is the decree of the United States circuit court to which we have already referred; and that, of course, is not binding on these plaintiffs. Neither would the contract between these two companies be binding on plaintiffs or the grantors, for they were not parties thereto. But we do not care to rest our decision on this ground, although defendant's title to the roadbed and improvements in question is extremely doubtful. The Union Pacific Company went upon the land in question knowing that it had no title thereto, and from the land itself made the embankment in controversy. It added some riprapping to hold the embankment in place, and put ties and rails thereon. It was not, perhaps, a trespasser, for it had the implied consent of the owners to enter and make the improvements. We are not prepared to say that, in the absence of a deed for the land on which the embankment were constructed, the Union Pacific Company could not enter upon the land and remove the ties and rails, and perhaps the stone hauled there by it, or that it could not transfer its right to another railroad company, so that company might proceed by *ad quod damnum* proceedings to acquire title to a right of way, under the statutes of this state, without paying the owner for these improvements. But the question before us is much broader than this. The Union Pacific Company, after erecting its improvements, made a deed of bargain and sale to the land on which the same was located to plaintiffs and grantors. This deed also contained covenants of special warranty, and was made, as the witnesses say, from whom we have quoted, to quiet the title to the right of way. True, the Union Pacific Company did not, through any of its agents, make such representations; and the case must turn on the effect to be given this deed. It is a familiar principle of law that no one shall be allowed to dispute his own solemn deed; in other words, he is estopped by his deed from saying that he had no interest in the land at the time of his conveyance. *De Frieze v. Quint*, 94 Cal. 653, 30 Pac. 1, 28 Am. St. R. 151; *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99; *Comstock v. Smith*, 13 Pick. 120, 23 Am. Dec. 670; *Logan v. Eaton*, 66 N. H. 575, 31 Atl. 13; *McFadden v. Allen* (N. Y.) 32 E. 21, 19 L. R. A. 446. This rule does not, of course, operate to preclude the admission of parol evidence to identify

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the property granted, nor does it, in a proper case, estop the grantor from claiming that property not necessarily included in the grant was not intended to be conveyed. In other words, parol evidence is sometimes admissible to apply the description found in the grant to the land intended to be conveyed, and, in cases of uncertainty or ambiguity in the terms of the grant, to make certain that which can be made certain, and in a proper case to determine what are removable fixtures as between grantor and grantee. Neither of the first two rules or exceptions apply to this case. There is no ambiguity or uncertainty in the description contained in the deed from the Union Pacific Company, and the defendant does not claim that parol evidence was offered for the purpose of applying the description to the land in controversy. Its claim, as we understand it, is: First, that parol evidence was admissible for the purpose of arriving at the intent of the parties, and, second, that it was admissible for the purpose of showing that the property in controversy was a fixture or improvement, which did not pass by the deed in question. No attempt was made in this case, or by any other action, to reform the deed; hence that feature is out of the case. There being no uncertainty or ambiguity in the deed, parol evidence was not admissible for the purpose of showing the intent of the parties. To admit it under such circumstances would be contrary to well-settled rules of law.

Was it permissible, then, to show that the roadbed was a fixture, and did not pass by the deed, in the absence of an express exception or reservation written to the deed itself? We think not. As to the embankment itself, it was not a fixture, no more so than a dyke or levee or a well put on the land. It was part of the land itself, and undoubtedly passed by the deed. As to the riprapping, we think the same rule applies. It might be, in a proper case, that the ties and rails would not pass, but here we think they did, and for this reason: If the Union Pacific Company had owned the land or right of way on which the embankment was erected, and had made the deed it did, we apprehend there would be no question about the entire property—embankment, ties, and rails—passing to its grantee. *Van Keuren v. Railroad Co.*, 38 N. J. Law, 165. The claim that the embankment, ties, and rails did not pass is bottomed on the thought that it had no title to the land or right of way covered by the deed. May it or its grantees or assignees show that it had no title to the land in the face of its solemn deed thereto? Surely not, for to permit them to do so would be to violate the rule of estoppel by deed to which we have already referred. In other words, to take the embankment in controversy out of the terms of the grant, the Union Pacific Company or its grantees must be permitted to show that this company had no title to the lands it sold to plaintiffs' grantors. This the rules of law will not permit. The doctrine of estoppel is a salutary one, and to establish



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the rule contended for by appellee would be to destroy the security of all land titles, and permit grantors, after solemnly affirming that they had title, to insist that they did not, although subsequent good-faith purchasers may have parted with their money, as in this case, on the strength of the integrity of the title. There are, as it seems to us, no two sides to this question.

But appellee argues that the original agreement of settlement was made a part of the deed, and that it should be considered in arriving at the intent of the parties. There are two answers to this. In the first place, the deed refers to this agreement for its consideration, and the granting clause makes no reference thereto; second, the improvements were not made when the settlement was had, but were constructed thereafter, and the deed was made after the embankment was erected. As to the granting clause the deed speaks from its date, and the contract under which it was made became functus officio, except as it was embodied in the deed itself or referred to therein. Manifestly, the contract did not and could not refer to improvements not then in existence, and as we have said, it is only referred to in the deed as furnishing the consideration therefor. To take the embankment out from under the operation of the deed it is necessary to show an exception or reservation, and this cannot be done by parol. *Smith v. Price*, 39 Ill. 28, 89 Am. Dec. 284. It is true that in certain cases parol evidence is admissible for the purpose of showing the real consideration for a deed; but this rule cannot be employed for the purpose of varying its legal effect. *Dunbar v. Strickler*, 45 Iowa, 384; *Schrimper v. Railroad Co.* (Iowa) 23 Am. & Eng. R. Cas., N. S., 385, 82 N. W. 918 and cases cited. On the theory that parol evidence is admissible to show the true consideration, the grantor cannot introduce an exception or reservation which should have been embodied in the granting clause. See cases heretofore cited. Clearly, the deed must be construed with reference to its date and it is not competent to ingraft a parol reservation or exception thereon. In none of the cases relied upon by appellee does it appear that the company constructed the roadbed and made a deed therefor to some other party, who was relying upon the terms of the grant; hence they are not to our minds in point.

It is not shown, as we have said, that plaintiffs were informed, before they acquired title and expended their money, that the Union Pacific Company was claiming that the roadbed and right of way should have been reserved from the grant. Indeed, Mr. Webster, who procured the deed from the Union Pacific Company, and who attempted to secure the corrected one, says that the company said nothing at any time indicating that it was its intention to reserve the roadbed at the time it executed the first deed. All that is shown in this respect is that the company said that, if a new deed was ex-



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ected, it ought to reserve a right of way. This was not communicated to the plaintiffs, however; and, while they found the Union Pacific Company in possession of the embankment at the time they purchased, they did not pay out their money until the deed was obtained from that company. This adds strength to the doctrine of estoppel, although the company made no representations except those to be inferred from its deed.

There is no doubt of the general rule, relied upon by appellee, that one may erect improvements on the land of another which do not become a part of the real estate; and, were it not for the deed made by the Union Pacific Company, we would be inclined to agree with them in their conclusion that this embankment belonged to the Union Pacific Company, or its grantees, and that plaintiff are not entitled to compensation therefor; but in the face of this solemn instrument it does not lie in the mouth of that company or its grantees to say that it had no title to the lands, and, therefore, that the improvements thereon did not pass by the deed. When a railroad company enters upon the land of another, builds a roadbed, places ties and rails thereon, they, as a general rule, in the absence of abandonment to the owner, belong to the company constructing the same, or to its grantees or assignees, and the landowner cannot, in condemnation proceedings, have the value thereof included in his award. This is a familiar doctrine requiring no support from the authorities. But when that company makes a deed to the land on which the improvement is erected, which deed contains no reservation, it will not be permitted to show, for the purpose of eliminating the improvements, including the roadbed, that it had no title to the land it attempted to convey. Reduced to its last analysis, the question that issue is a very narrow one, and one, we think, which is clearly settled by the doctrine of estoppel. If the deed from the Union Pacific Company to Street and the Nebraska Ferry Company did not convey this embankment and trackage, it did not convey anything; and, if the defendant is to prevail in this litigation, it must be on the theory that this deed is nothing more than waste paper. This should not, for the most salutary reasons, be permitted to stand. Doubtless, as between the Union Pacific Company and Street and the Nebraska Ferry Company, the embankment, and especially the ties and rails, was, before the execution of the deed, personal property, and might be said to be a trade fixture, under the doctrine announced in *Railroad Co. v. Bryce*, 61 Kan. 394, 59 Pac. 1040, 48 L. R. A. 241, and Justice in *Railroad Co.*, 87 Pa. 28. But when that company undertook to grant the land on which these improvements are situated, and made no exception or reservation thereof, and did not undertake to remove the same within a reasonable time after it made the sale, its grantee or assignee cannot be heard to say that its deed was of no effect, and that it is entitled to the roadbed and improvements. Appellee has cited no case

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which runs counter to these rules; and we do not think any can be found. On the other hand, our conclusions find support in the following among other cases: *Hunt v. Iron Co.*, 97 Mass. 279; *Meriam v. Brown*, 128 Mass. 391.

Suggestion is made by counsel that the Union Pacific Company and its grantees have always claimed to own the embankment in question. This is not verified by the record. On the contrary, it is shown that plaintiffs have always since their purchase claimed to own the same, and have endeavored to get Webster to concede their claims. The reservations contained in the deeds from the ferry company and from Street are of no importance. They neither recognize nor affirm that a right of way exists over the lands in controversy, and defendants are not claiming that they have a right of way. The sole question with them is, shall they be compelled to pay for the embankment, etc., in addition to the land actually taken? We hold that they should pay for it, and, of course, disagree with the learned trial judge in his conclusions.

2. The second point barely needs mention. Having found that plaintiffs were the owners of the roadbed, and that defendant went into possession in March, 1894, the time fixed for the award of damages as found by the trial court is manifestly correct. *Daniels v. Railroad Co.*, 41 Iowa, 52. Had we found with appellee, on the first point, that the roadbed passed from the Union Pacific Company, through the East Omaha Land Company or the Nebraska Construction Company, to the defendant, the second question would then have become important. It is sufficient to say in this connection that, if we had so found, it is clear that compensation should have been made as of the date of the original entry by the Union Pacific Company, in December, 1889, and the result in dollars and cents would be practically the same as under our present holding. If defendant has title to the roadbed in controversy, it is because it acquired the same as personal property mediately from the Union Pacific Company, and its entry must relate back to the time that company took possession of the lands and began its improvements thereon. *Daniels v. Railroad Co.*, 35 Iowa, 129, 14 Am. Rep. 490; *Drury v. Railroad Co.*, 127 Mass. 571; *Railway Co. v. Ortiz*, 75 Tex. 602, 12 S. W. 1129; *Harbach v. Railway Co.*, 80 Iowa, 593, 44 N. W. 348, 43 Am. & Eng. R. Cas. 115, 11 L. R. A. 113. We place our decision, however, on the first point, and find that plaintiffs should have been awarded the value of the roadbed to wit, \$4,903.45, in addition to the value of the land; and plaintiffs may have judgment in this court, if they so elect, for the value of the land actually taken, to wit, \$5,310, and the value of the roadbed,—in all, \$10,213.45,—with 6 per cent interest thereon from March 23, 1894, down to the time of the entry of the decree, and the further sum of \$1,000 attorney fees, as allowed by the district court, and the costs of suit both in the district court and upon this appeal.

Modified and affirmed.

**MURRAY v. NORTHWESTERN R. Co.***(Supreme Court of South Carolina, October 17, 1902.)*

[42 S. E. Rep. 617.]

**Issue—Parol Evidence.**

Parol evidence is admissible to explain a covenant in a deed "to establish and maintain a freight and passenger depot," to show the intent of the contracting parties at the time of the execution of the deed.

**Issue—Covenant to Erect Depot—Specific Performance.**

Where a covenant to establish and maintain a depot for freight and passengers was a part of the consideration of the deed to a railroad company, and the building was to be erected on the land thereby conveyed to the company, and of which it was put in possession, equity will decree its specific performance.

Appeal from common pleas circuit court of Sumter county; Jackson, Special Judge.

Action by George W. Murray against the Northwestern Railroad Company. Decree for plaintiff, and defendant appeals. Affirmed.

The following is the decree of the circuit court:

'This case came before me at a special term held for Sumter county, in the week beginning 16th of December, 1901, on exceptions by both plaintiff and defendant to the master's report, to whom all the issues had been referred. The plaintiff owned a large tract of land in Sumter county, which was crossed by the selected route of the Northwestern Railroad from Sumter to Camden, and upon which the defendant had entered for the purpose of grading and track laying. Disputes arose between Murray and the railroad company, followed by litigation. Murray and certain of his tenants filed petitions for compensation under the right of eminent domain, and others were threatened, when the railroad company brought their action to restrain those proceedings, alleging that Murray had given his consent to the occupation of his land by this railroad upon the company's undertaking to establish a station and erect a depot at a point on Murray's land to be called 'Borden.' The complaint in the action of the Northwestern Railroad Company against George W. Murray and others, verified by Thomas Wilson, president, alleged that Murray had agreed to let the railroad company have a right of way through his lands, and one acre of land for depot purposes, in consideration of \$150 in money and the company's agreement to establish a railway station or depot thereon, and that in part performance of said contract the railroad company had purchased and paid for the necessary lumber and building materials for the erection of the necessary station house, depot, and other structures, and caused the same to be placed alongside the said railroad, and was in the prosecution of the completion of said work when the plaintiff interfered with by the legal proceedings hereinafter referred to.



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"On the return to the rule to show cause before Judge Townsend, affidavits by Thomas Wilson and C. C. Dunn were read in the hearing of George W. Murray. Wilson, president, stated in his affidavit 'that the deponent, acting for said company, and in the further pursuance of said contract and agreement, \* \* \* had purchased and paid for the necessary lumber wherewith to erect said depot and station house, and was about to commence the same when the aforesaid restraining order was served.' C. C. Dunn, superintendent of construction of this road, stated in his affidavit, dated 3d of March, 1900, 'that, acting under the instructions of said company, he made out and delivered to Messrs. Seals & Carson, manufacturers of lumber, a bill of lumber for the framework of the depot at Borden, and pointed out the location to the said Seals & Carson where said station was to be established and said lumber used; that this occurred some six weeks or two months ago, since which time the aforesaid lumber has been cut and delivered alongside of said railroad, and the same paid for.' Testimony taken before the master in the case now under consideration shows that this lumber was cut and delivered for a depot at Borden of the same plan and dimensions as the depot at Dalzell, the nearest station toward Sumter, and a contract made with a builder to erect a depot at Borden like that at Dalzell. Moreover, that there was an agent of the company at Borden, as there was at Dalzell, discharging the duties of station agent for the sale of tickets and the receipt and delivery of freight; such agent at Borden occupying a box car for these purposes. All these things being known to Murray and the railroad company, and this condition of things still existing, on the 5th of May, 1900, subsequent to Judge Townsend's order granting the interlocutory injunction prayed for by the railroad company, and in settlement of all litigation between the parties then pending, Murray made, and the railroad company accepted, a deed of that date, whereby Murray and his tenants conveyed to the railroad company a lot of land for depot purposes at Borden, and a right of way across his lands. This deed was made upon the consideration of \$150 in money, and 'the covenant and agreement' of the railroad company 'to establish and maintain a freight and passenger depot' at Borden. This deed contained the further stipulations: 'And it is expressly covenanted and agreed that the consideration money hereinbefore named, and the condition of the establishment and maintenance of the said freight and passenger depot at said station called "Borden" by the grantee, its successors and assigns, is in full payment, satisfaction, and compensation for the aforesaid right of way and easement over and through the said tracts of land above described, and also the aforesaid one-acre plot of ground and including all special injury and damage, past, present, or future, suffered or to be suffered by the grantors hereof, or their heirs, executors, administrators, and assigns, from or by

ason of the construction and operation of said railroad over and upon the aforesaid premises. And it is further covenanted and agreed that in the event that the said Northwestern Railroad Company, its successors or assigns, shall not establish a passenger and freight station at said place called Borden," or, having established such station, shall cease to maintain the same, then and in that event the right of way and easement hereby granted shall revert to the grantor, George W. Murray, above named.' The company paid to Murray the money consideration called for, and have held the depot lot and right of way ever since, and still use the latter as a part of their railroad line between Sumter and Camden. But soon after the acceptance of this deed, the company changed its plans, removed its present agent, otherwise disposed of the lumber so cut and delivered for the Borden depot, made Borden a prepay flag station, procured a merchant there to act as agent to the extent of keeping its so-called depot stocked, and of delivering freight, without authority to receive freight or sell tickets, and erected a building ruder and smaller than that which was in contemplation when the deed was delivered, and with no accommodation for passengers, other than an open, uncovered platform, without seats. The depot at Remberts, next beyond Borden from Sumter, was afterwards built just like the one at Dalzell.

"The plaintiff in this case prays for a specific performance of the contract made by his deed and the acceptance thereof, and for damages for the defendant's delay, or that the value of the property so held by the railroad company be adjudged to him for the failure of the defendant to erect and maintain such depot accommodations at Borden as were contemplated by the parties. Defendant contends that the phrase 'freight and passenger depot' means such a depot as would answer the demands of freight and passenger traffic at that point, and that parol testimony is inadmissible to reform the deed or to vary or add to the deed. But I hold that parol testimony is admissible of such facts as will show the surrounding circumstances at the time, and so reach the meaning of that phrase as understood by both grantor and grantee, under which the railroad company acquired its long right of way. Therefore the master properly received and considered the facts above recited, and, in the light of those facts, properly held that a freight and passenger depot at Borden meant accommodations equal to those at Dalzell, and, I will add, equal to those at Remberts.

"The contract being thus certain, definite, and specific, and the depot accommodations at Borden not being such as the deed called for, the next question is, can the defendant be required to specifically perform its contract, and so discharge the consideration for which it obtained the property rights so acquired and now held? Upon this question there may be some conflict of authority. I have been referred to no case



from the courts of this state that decides this point, in judgment. But it seems to me that specific performance should be decreed, and that it would not be proper to permit the defendant to accept all of the rights acquired by it under this agreement, and withhold the mandate of the court requiring it to perform its part of this same agreement. I find strong authority in support of this conclusion. In *Storer v. Railway Co.*, 2 Younge & C. Ch. 48, the court compelled the defendant to construct and maintain an archway and its approaches; the court saying there was no difficulty in enforcing such decrees. In 2 Beach, Mod. Cont. § 883, the author says: 'The rule is not universal that courts of equity will never assume jurisdiction to enforce a contract which requires some building to be done. They have enforced such contracts from the earliest days to the present time.' Citing in note 3 several such cases. Lewis, Em. Dom. § 296, says: 'Agreements by a railroad company to build crossings or fences, or to locate and build a depot, or to do other things for the benefit of the grantor, may be specifically enforced.' In *Stuyvesant v. Mayor, etc.*, 11 Paige, 426, there was a grant of land on the condition that the city of New York should make certain improvements. Chancellor Walworth thus declared the law: 'The true rule on the subject of decreeing the specific performance of a covenant in such cases is that where, from the nature of the relief sought, performance in specie will alone answer the purpose of justice, this court will compel a specific performance, instead of leaving the complainant to a remedy at law, which is wholly inadequate. The court has jurisdiction, therefore, to compel the specific performance by the defendant of a covenant to do specified work, or to make certain improvements or erections upon his own land for the benefit of the complainant, as the owner of the adjoining property, who has an interest in having such work done, or such improvements or erections made, and where the injury to the complainant from the breach of covenant is of such nature as not to be capable of being adequately compensated in damages.' In the case of *Ross v. Railway Co.*, 1 Woolw. 37, Fed. Cas. No. 12,080, the court refused to direct specific performance of a contract for the construction of a railroad which would require years to be completed. But in that case Mr. Justice Miller reviews the cases, citing *Errington v. Aynesly*, 2 Brown, C. 341, and *Lucas v. Commerford*, 3 Brown, Ch. 166, and 1 Ves. Jr. 235, where the court refused to order specific performance because, 'if one person would not build, another might be found who would,' and because the court could not undertake to superintend the construction of a building. Judge Miller then calls attention to several cases where specific performance was decreed of a contract by a railroad company, 'in consideration of a right of way, to make an arched way under a roadbed' (*Storer v. Railway Co.*, 2 Younge & C. Ch. 48); and consideration of a sale of land to build a street and erect a building.

market (Price v. Mayor, etc., of Penzance, 4 Hare, 506); for the grant of a piece of land for a park, a contract to grade, inclose, and improve the premises (Stuyvesant v. Mayor, etc., 11 Paige, 414); to complete a hotel (Birchett v. Bolling, 5 Munf. 442). And Judge Miller calls attention to the fact that in these latter cases 'the building was to be done on the land of the persons who agreed to do it.' 'The consideration of the agreement was the sale or conveyance of the land on which the building was to be erected, and the plaintiff had already, by such conveyance on his part, executed the contract, and the building was in some way essential to the use or contributory to the value of adjoining land belonging to the plaintiff,'—all of which conditions exist in this case. Other authorities in the master's report and in the argument submitted to me by counsel for plaintiff seem to support the view I have taken. It is a definite and certain contract, the consideration for which defendant received and now enjoys; and unless defendant perform his undertaking to build a freight and passenger depot, as understood by the parties, it will be impossible for the plaintiff to get that in exchange for which he granted the right of way. Nor can I see any difficulty in carrying out a decree for the specific performance of defendant's agreement.

"I further hold that no damages should be decreed to plaintiff for the delay up to this time in establishing and maintaining the proper depot accommodations at Borden required by the deed. The pecuniary damage to plaintiff does not appear to me to be serious, and the railroad had been in operation less than a year when this action was commenced.

"It is therefore ordered and decreed that plaintiff's fourth exception to the master's report be sustained, and the others overruled; that so much of defendant's fifth and sixth exceptions as charges error to the master in awarding \$500 damages to the plaintiff be sustained, and its others overruled; and that the master's report, with these changes and modifications, be confirmed. It is further ordered and decreed that the defendant do cause to be erected by May 1, 1902, a freight and passenger depot at Borden, like to that now at Dalzell, a station on its road, with like facilities for the receipt and delivery of freight and for the convenience and accommodation of passengers. Let notice of the filing of this decree, with a copy of its directions, be served forthwith on the defendant or its attorneys."

The defendant appeals on the following exceptions:

"(1) Because his honor erred, it is respectfully submitted, in not construing the alleged contract set up in the complaint by its terms alone, and without resorting to parol and extrinsic evidence.

"(2) Because his honor erred, it is respectfully submitted, in receiving and considering extrinsic and parol evidence in determining the meaning and effect of the contract set up in

the complaint as the basis of the plaintiff's action, and in that he did not confine himself alone to the terms employed by the grantor in his said deed.

"(3) Because his honor erred, it is respectfully submitted in holding and deciding as follows: 'But I hold that parol testimony is admissible of such facts as will show the surrounding circumstances at the time, and so reach the meaning of that phrase, "freight and passenger depot," as understood by both grantor and grantee, \* \* \* and in further holding that a freight and passenger depot at Borden means accommodations equal to those at Dalzell, and, I will add, equal to those at Remberts,' for that thereby his honor permitted the deed of the plaintiff to be added to, enlarged, and varied by parol testimony, and, in effect, constituted a new and different contract from that set out in the complaint.

"(4) Because his honor erred, it is respectfully submitted in not sustaining defendant's first exception to the master's report, and in overruling the same; said first exception being as follows: 'Because the master erred in admitting parol testimony to explain the plaintiff's deed set out in the complaint as a basis of plaintiff's action, and to add to the same by extending and enlarging the terms of the alleged contract of the defendant therein set forth, and, in effect, making a new contract for the parties to the same, and in finding that a depot such as existed at Dalzell, another station on said railroad should have been built and maintained by defendant at Borden, in that thereby the master permitted the plaintiff to add to, vary, and enlarge and explain an instrument in writing, the terms of which are plain and unambiguous, and in that he thereby disregarded the rule of the law that the said deed should be taken most strongly against the grantor therein, and in that he thereby disregarded the further rule of the law that in actions for the specific performance of contracts it is the duty of plaintiff to show and prove a contract on the part of defendant, clear and definite in its terms; and, furthermore, because the records of the previous action and other evidence thus erroneously admitted in testimony related to the establishment of the station at Borden, on the line of said railroad, and not to any particular kind of depot, for that thereby the written contract set up in the complaint was allowed by the court, by the aid of parol testimony, to be varied, added to, and explained, and, in effect, a new and different contract to be made out and established as the contract of the parties to the cause.'

"(5) Because his honor erred, it is respectfully submitted in holding and deciding as follows: 'It is further ordered and decreed that the defendant do cause to be erected \* \* \* a freight and passenger depot at Borden, like to that now at Dalzell, \* \* \* with like facilities for the receipt and the delivery of freight and for the convenience and the accommodation of passengers,'—for that such holding is not warranted

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by the terms of the deed set up in the complaint, and the terms of said deed could not lawfully be added to and enlarged by parol testimony.

“(6) Because his honor erred, it is respectfully submitted, in overruling the defendant's second exception to the master's report, as follows: ‘Because the master erred in finding that defendant had not established and did not maintain a freight and passenger station and depot at Borden on the line of said railroad, and in that he should have found the contrary, and should have found the defendant had established and was maintaining in every day use a freight and passenger station and depot at Borden; that four trains stopped at Borden every day when necessary to receive and discharge all freight and passengers destined to or from that station; that the trains on said railroad ran only in the daytime; that the said station was duly entered upon all the timetables and schedules of the defendant company; that the hours for the daily arrival and departure of all of the defendant's trains at Borden were duly published in the newspapers of the county, and full notice of same given to the public; that passenger tickets to the station called “Borden” were regularly kept on sale, and were habitually sold to all passengers requiring the same; that all freight destined for Borden was duly received by the defendant, transported to and delivered to the consignees thereof at said point; that regular bills of lading were issued to that station for all freight shipped thereto; that bills of lading were duly issued at Borden for all freight shipped from that point; that the plaintiff himself had shipped freight from said station; that a duly appointed agent of the defendant company was located there; that one Samuel Folk, a member of the firm of R. C. Folk & Co., merchants doing business at Borden, and located a few yards from the depot building, was the duly appointed agent of the defendant company at Borden, and had charge of its depot there; that the defendant had erected and was habitually using a serviceable and substantial building immediately along its side track at Borden, consisting of one full-size room for freight and passengers, with an overhanging shed to same, with platforms adjoining the same, and also a standard umbrella shed for the greater convenience of passengers, and others structures, which were ample for the accommodation of all freight and passengers at said depot; that said depot and other structures were much more complete and commodious than the facilities established at other stations on said railroad doing a very much larger business than at Borden; that said station called “Borden” was situated in the back country, surrounded by plaintiff's property, and with no public roads leading to the same; that the business at said station called “Borden” did not average one passenger a day, and only a very small volume of freight; that ample depot room and facilities had been established and were being maintained by the defendant at Borden; and that the defendant



company had substantially and for all practical purposes complied with and performed its agreement as set forth in said deed.' And from the facts found by the master and the circuit judge, he should have held that the defendant had complied with the terms of said deed, and had erected and was maintaining a freight and passenger depot at the station called 'Borden.'

"(7) Because neither the contract set up in the complaint nor the parol testimony, warranted the court in ordering 'that the defendant do cause to be erected \* \* \* a freight and passenger depot at Borden like that now at Dalzell, \* \* \* with like facilities for the receipt and delivery of freight and for the convenience and accommodation of passengers.' And his honor erred in so holding, for that such order and decree involves and requires, inter alia, the employment and retention of a resident freight and passenger agent at Borden, a telegraphic operator there, the keeping of tickets on sale, and other like matters not within the contract of the parties to the action.

"(8) Because his honor erred, it is respectfully submitted in holding and deciding that the contract set up in the complaint, to wit, the contract to 'erect and maintain a freight and passenger depot at the station called "Borden," was incapable of being enforced by the court of equity, for that such a contract requires the perpetual supervision of the court, is wholly inconsistent with the functions of the court of equity and is incapable of specific performance under its decrees. And his honor erred in not so deciding.

"(9) Because that in ordering and decreeing that the defendant 'do cause to be erected \* \* \* a freight and passenger depot at Borden like that now at Dalzell, \* \* \* with like facilities for the receipt and delivery of freight and for the convenience and accommodation of passengers,' the court exceeded its jurisdiction, for that the contract set up in the complaint is one in perpetuity, is incapable of being specifically performed, and the remedy of the plaintiff is an action at law for damages, and his honor erred in not so holding and deciding.

"(10) Because his honor erred, it is respectfully submitted in sustaining the plaintiff's fourth exception to the master's report, as follows: 'Because the master held, as a conclusion of law, that the contract between plaintiff and defendant was such a contract as a court of equity cannot enforce.' And his honor should have overruled said exception, and sustained the master's report in that respect, for that said contract is one in perpetuity, requiring the constant supervision of the court, is wholly inconsistent with its functions, and is incapable of being specifically performed under its decree.

"(11) Because his honor erred, it is respectfully submitted in not holding and deciding, as matter of law, 'that the c



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tract between the plaintiff and the defendant was such a contract as the court of equity cannot enforce.'

"(12) Because the said decree is indefinite, inconclusive, and uncertain, in that neither the report of the master nor the decree of the court defines or describes with particularity the depot directed to be constructed."

Lee & Moise, for appellant.

Moise & Clifton and R. W. Shand, for appellee.

POPE, J. The object of plaintiff's action was to require the defendant to specifically perform its agreement to erect a proper depot at a station called "Borden," on its railroad, on the acre of land conveyed by plaintiff to the defendant by deed, and to have defendant pay to plaintiff \$1,000 for damages for defendant's failure to do so at an earlier date, or that, upon its failure to erect said depot, the defendant shall be required to pay to plaintiff the sum of \$14,850 as damages for breach of its contract. The defendant denied by its answer that plaintiff was entitled to any relief as prayed for. All the issues of law and fact were referred to the master, H. F. Wilson, Esq., who, after taking a great deal of testimony and after full argument, reported that (referring to the deed executed by plaintiff and others to the defendant on the 5th May, 1900):

"At the time of the execution of said deed there was some litigation pending between the plaintiff and defendant relating to compensation for the lands of the plaintiff then being occupied by defendant for its right of way. In compromise, adjustment, and settlement of this litigation, the said deed was executed by the said George W. Murray and others, and accepted by the said defendant company, who produced it under notice in this case. The consideration set out in said deed is as follows: 'For and in consideration of the sum of \$150 to us in hand paid by the Northwestern Railroad Company of South Carolina, a railroad corporation duly chartered under the laws of said state, and its covenant and agreement to establish and maintain a freight and passenger depot at a station called "Borden," on said railroad, in said county.' There is also the further stipulation set out in said deed: 'And it is further covenanted and agreed that in the event that the said Northwestern Railroad Company, its successors or assigns, shall not establish a freight and passenger station at said place called "Borden," or, having established such station, shall cease to maintain the same, then and in that event the right of way and easement hereby granted shall revert to the grantor, George W. Murray, above named.'

"It is conceded that the \$150 was paid to the said plaintiff by the said defendant, but it is contended that the freight and passenger depot has not been established and maintained at the station called 'Borden,' and it is for the specific performance of this part of the agreement that this action is brought,

and for damages for such nonperformance of the contract. The defendant contends that the terms of the contract have been complied with. Some of the witnesses for the defendant testify that there are many kinds of depots and stations, from a mere flag station, where there are no buildings at all—only a place usually a public highway crossing or a railroad side track, where passengers or freight or both are put off and taken on, and where there is no agent to attend to the company's business,—to the most modern depot, with all its equipments and conveniences, and that the expression in the deed above referred to, 'freight and passenger depot,' might mean either the one or the other, or any intermediate kind. The plaintiff offered parol testimony to explain the meaning of the expression used in said deed, 'freight and passenger depot,' and to show what kind of a freight and passenger depot was intended by the parties plaintiff and defendant at the time the said deed was executed and delivered by the plaintiff, and received by the defendant. I allowed this testimony to come in under the authority of the case of *Rapley v. Klugh*, 40 S. C. 145, 18 S. E. 680, and other authorities cited by plaintiff. This parol testimony showed that the freight and passenger depot to be established and maintained at the station called 'Borden' was to be similar to the freight and passenger depot then established and being maintained with a resident freight and passenger agent, at a station called 'Dalzell,' on said railroad, some five miles from the said station called 'Borden'; that soon after the execution of said deed the defendant company built at the station called 'Borden' a freight wareroom some 15 feet by 16 feet in dimension with platforms extending the length of same in front and rear, such platforms being six feet wide; that subsequent to the commencement of this action the said defendant company built at the station called 'Borden' an 'umbrella shed' for the accommodation of passengers; that the station called 'Borden' was known as a 'flag station,' where trains only stop upon signal, or for the discharge of passengers or freight; that tickets were sold to the said station called 'Borden' from other points, and that freight, when the charges were prepaid, was billed to Borden, but that no tickets were sold at Borden for other points; that there was no resident bond agent of the defendant company at Borden, some arrangements having been made with Mr. Folk, who kept a store a few yards from the said wareroom, when there to deliver freight to parties calling for same. This service was paid for by defendant company by a free pass over its said road. The testimony also shows that the plaintiff, George W. Murray, has brought out all the reversionary interest of the parties other than himself who signed the deed above referred to, as marked in evidence 'Exhibit S.'

"The plaintiff offered testimony as to the value of the land of the plaintiff occupied by the defendant company as a right

of way. This testimony was objected to by the defendant upon the ground that it was irrelevant. I sustained the objection of the defendant for the reason that the pleadings in this case confined the proof to the fact as to whether or not the defendant company has complied with its contract as set out in the deed. Even if such testimony is relevant to the issues in this case, that offered was so vague and indefinite that I have been unable from the testimony to arrive at any satisfactory conclusion as to the value of such right of way.

"I find as matter of fact from the testimony that the plaintiff has bought all the reversionary interests of the parties other than himself who signed the deed in evidence in this case, marked 'Exhibit S.'

"I find as matter of fact from the testimony that the expression 'freight and passenger depot,' as used in said deed in evidence, Exhibit S, was intended to mean and did mean such a freight and passenger depot as was then established and maintained, with a resident freight and passenger agent at Dalzell, a station on the said Northwestern Railroad.

"I find as a matter of fact from the testimony that the said defendant company has not established and maintained such a freight and passenger depot, with a resident agent, at the station called 'Borden,' on the said Northwestern Railroad.

"I find as a matter of fact from the testimony that the plaintiff, George W. Murray, has been damaged by the failure of the said defendant company to establish and maintain such a freight and passenger depot at the station called 'Borden,' and that the amount of such damage has been the sum of \$500, up to the date of this report.

"The defendant claims, as matter of law, that the complaint should be dismissed, for the reason that the contract as set up in the complaint and in the deed in evidence, Exhibit S, is such a contract as the court of equity cannot and will not enforce by specific performance. This brings up the only question of law in the case, as I see it. It seems to be the general rule in this state and elsewhere that courts of equity will not enforce by specific performance contracts to construct buildings and make repairs, for the reason that it would be impracticable, if not impossible, for an officer of the court to carry out such decree. 22 Am. & Eng. Enc. Law, p. 996; McCarter v. Armstrong, 32 S. C. 225, 10 S. E. 953, 8 L. R. A. 625; Columbia Water Power Co. v. City of Columbia, 5 S. C. 255. This rule, however, that courts of equity will never assume jurisdiction to enforce a contract which requires some building to be done, is not universal. They have enforced such contracts from the earliest days to the present time. A few cases may be referred to as illustrating the power vested in a court of equity to compel the specific performance of contracts similar to the one at bar. In Storer v. Railway Co., 2 Younge & C. Ch. 48, the court compelled the defendant to construct and forever maintain an archway and its approaches.

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The court said there was no difficulty in enforcing such a decree. In *Wilson v. Railway Co.*, L. R. 9 Eq. 28, the defendant was compelled to erect and maintain a wharf. See, also *Wat. Spec. Perf. Contr.* §§ 11, 28-30; *Lewis, Em. Dom.* p. 296. Agreements by a railroad company to build crossings or fences, or to locate and build a depot, or to do other things for the benefit of the grantor, may be specifically enforced. It is no answer to suit for specific performance that a specific description of the thing to be done is not contained in the deed or contract. That which is reasonably suitable under the circumstances to answer the purpose intended is what the contract implies. 'L. granted the right of way to a railroad company over his premises, in consideration of which the company agreed to erect and maintain bridges over certain crossings, and also to erect at or near Excelsior Spring a new and tasteful station building, to be called "Excelsior Spring," at which all regular trains should stop. The company entered and built its road, but refused to comply with its agreement. On a bill for specific performance, it was contended by the company that the agreement was too indefinite to be enforced, that the style and plan, size, and materials of the structure were not specified. But the court held otherwise. 'To insist that the railroad cannot build a bridge, because they do not know whether it should be of wood or iron, or gold or platinum, is a poor excuse. A bridge suitable for a highway crossing is what was intended, and that is definite enough. In *Bisp. Eq.* (6th Ed.) p. 501, it is said: 'If within the power of the court to supervise the performance of the contract, and the equities which justify its specific enforcement exist, the agreement will be enforced. And of late the supervisory power of the court has been extended to cases which it formerly might not have been thought to cover. Thus courts of equity have assumed jurisdiction to enforce the performance of contracts to operate railways, for the enforcement of agreements between railroad companies for the use of their tracks, and the like; and this advancement in remedial equity must be deemed not only serviceable in the interest of the business affairs of men, but justified by the inherent elasticity of chancery powers.' The authorities above cited, while tending to show 'advancement in remedial equity,' and may be 'justified by inherent elasticity of chancery powers,' still none of them go to the extent of enforcing by specific performance such a contract as the one at bar. Here the court is called upon to specifically enforce the establishment and maintenance of a freight and passenger depot. Granting that the contract made definite by the parol evidence making the freight and passenger depot to be established and maintained at Borden, similar to that established and maintained at Dalzell, still it would be impracticable, if not impossible, for an officer of the court to carry out its decree requiring such a freight and passenger depot to be established and maintained. To do so

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would require the supervision first of the building, and then of the daily recurring duties of the agent, and that for an indefinite period of time. It is asking the court to go a long way towards assuming, if not the direction and control, at least the supervision, of the defendant company's business. This, it seems to me, the court will not undertake to do. I have with great reluctance reached the conclusion that the contract in this case, even as explained by the parol testimony, is such a contract as the court of equity cannot enforce by a specific performance, yet I so find as matter of law. All of which is respectfully submitted."

Both sides excepted to this report. The exceptions came on to be heard by his honor J. H. Hudson, as special judge, who sustained the plaintiff's exception, and also so much of defendant's exceptions as related to a recommendation of the master that defendant should pay plaintiff \$500 damages. The circuit judge held that it was competent to introduce testimony to show what the surrounding circumstances were when the defendant covenanted to erect a freight and passenger depot at Borden, so as to show what was in the minds of the parties to this action at that time, to wit, the deed of the plaintiff made in May, 1899. He also held the contract was to be enforced specifically by requiring the defendant to erect at once a depot for freight and passengers at Borden like that of defendant at Dalzell and at Remberts, two stations on defendant railroad, and also to have an agent to sell tickets at Borden. The defendant has appealed from Judge Hudson's judgment on 12 separate grounds. The reporter will incorporate in his report of this the 12 exceptions, as well as the decree of Judge Hudson. These exceptions may be grouped as follows: The first five exceptions, relating, as they do, to the alleged error of the circuit judge in holding that it was competent to receive and consider testimony going to show the circumstances surrounding and moving the parties in the execution of the contract to erect a freight and passenger depot at Borden, on defendant's railroad; the sixth exception, relating, as it does, to whether the defendant's building at Borden was such as was agreed upon by and between the parties to this action in May, 1899, when the deed and covenant were made; and, lastly, the seventh, eighth, ninth, tenth, eleventh, and twelfth exceptions, relating, as they do, in one form or another, to the power of the court of equity to decree that a contract to build a depot on its road should be specifically executed, including in this question whether the decree was sufficiently definite in its directions.

1. It seems to us that this court has already settled the question as to the competency of testimony addressed to the making clear an agreement whose terms need definiteness. It has long been settled law in the courts of this state, as well as in the United States supreme court, that it is competent to show by evidence outside of a deed or other instrument in



writing what was the true consideration as between the parties thereto. It is a matter of frequent occurrence in our courts that testimony is competent, aliunde the deed, to show that a deed of conveyance absolute on its face was simply mortgage to secure the loan of money. *Campbell v. Linder*, 50 S. C. 169, 27 S. E. 648. So, in regard to the use of the word "dollars" in a contract, the value of those dollars may be ascertained by testimony outside of the terms of the contract itself. *Thorington v. Smith*, 8 Wall. 1, 19 L. Ed. 361. *Confederate Note Case*, 19 Wall. 548, 22 L. Ed. 196. All these things have been allowed, not as adding to or varying a written instrument, but in the light of the surrounding circumstances, to show what was in the minds of the contracting parties. As was remarked at the beginning of our consideration of this point, our own decisions seem conclusive of this point. In this case at bar the question is what did the parties mean by the use of the words "a freight and passenger depot" to be erected by the defendant at the station called "Borden." As was remarked by the appellant, great latitude exists as to the structures known as "freight and passenger depots," ranging by his argument from the fine Union Station at Columbia, S. C., to the "umbrella shed" at present standing at Borden. These words can be explained by extrinsic verbal testimony. *Rapley v. Klugh*, 40 S. C. 134, 18 S. E. 680. *Willis v. Hammond*, 41 S. C. 153, 19 S. E. 310. Another apt illustration is furnished by the case of *Stoops v. Smith*, Am. Rep. 85, when the court in Massachusetts received parol testimony to show that "advertising chart" meant a chart of a certain material, to be published in a certain manner, as verbally agreed upon by the parties. In the case at bar the plaintiff was shown the lumber on the ground requisite for a depot just like that erected by the defendant at Dalzell station. The object of the plaintiff was to secure an attraction to outsiders to settle on his lands around Borden. We overrule these exceptions.

Sixth Exception. We cannot sustain this exception. It is patent to the eye that the unpretentious erection at Borden can scarcely be dignified as a depot for passengers. An "umbrella shed" is scarcely a depot for passengers. This exception is overruled.

2. Lastly, the master held that a court of equity could not undertake the task of a specific performance of the contract to erect a "depot for freight and passengers" at "Borden," with a resident ticket agent, etc. The circuit judge held otherwise, and so decreed. Was he in error? It is asserted that the text-writers and decisions vary on this subject. Whenever decisions are opposed to each other, it is always well to ascertain the grounds of the varying opinions of judges so as to learn if there is a principle upon which they are divided. The respondent, in his suggestive argument on this point, thus states his position: "There is a distinction in the

cases between the two classes of contracts for construction: (1) Building contracts, where one agrees, for a money consideration, to build a house for another on that other's land. Such contracts are not generally specifically enforceable, for the reason that the injury done by a breach is easily measured, and can be fully compensated in money. See note on pages 996 and 997 of 22 Am. & Eng. Enc. Law, where we read, 'The rule is almost universal that a covenant to build may not be enforced specifically, for the execution of such contract would be impracticable, if not impossible, for a court to supervise, whereas the remedy of damages would afford a full redress.' That is to say, the court cannot act as architect, and another builder may be had, and damages for the increased cost and delay recovered in action at law for damages. The second class is where one gets land from another upon the consideration of the grantee's erecting at his own expense a building on land actually conveyed upon the conditions that such building should be erected thereon. Miller calls attention to the fact that in these latter cases the building was to be done on the land of the person who agreed to do it, as in the case at bar. 'The consideration for the agreement was the sale or conveyance of the land on which the building was to be erected, and plaintiff had already, by such conveyance on his part, executed the contract [as in the case at bar], and the building was in some way essential to the use or contributory to the value of adjoining land belonging to the plaintiff' (as in the case at bar). This decision was in 1863. So that 22 Am. & Eng. Enc. Law, p. 996, shows the law to be just what we claim it to be. Section 296, Lewis, Em. Dom. (1st Ed.), also sustains us. In Hubbard v. Railroad Co., 63 Mo. 68, cited by Lewis, the court held that a plaintiff who relinquished his right of way for the location of a depot thereon might, after entry by the railroad, have his remedy in equity for a specific performance of the agreement to erect the depot; citing Aiken v. Railroad Co., 26 Barb. 289. The case of Lawrence v. Railway Co., 36 Hun, 467, is strong in support of plaintiff's contention. It held that where a railroad enters upon land, and constructed tracks and structures, so that it could not be restored to its original condition, the railroad company's contract to build a bridge at the east line, and a 'neat and good overhead bridge near my west line,' and 'erect a neat and tasteful station for the accommodation of passengers,' would be enforced, and was sufficiently explicit. And see Bisp. Eq. (6th Ed.) p. 501; Bisp. Eq. (4th Ed.) p. 140; and 5 S. C. 255. McCarter v. Armstrong, 32 S. C. 204, 10 S. E. 953, 8 L. R. A. 625, is inapplicable, because the case was clearly one that could be compensated in damages, —and, indeed, stipulated damages were fixed,—and because the proper drainage of lands was a matter difficult of ascertainment on rule to show cause why the decree had not been carried out. But in our case a decree directing defendant to

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erect at Borden a freight and passenger depot like that now at Dalzell, a station on its own railroad."

To our mind, the case at bar presents the case where the plaintiff has conveyed the land whereon the depot is to be erected; that the consideration moving to this conveyance was the erection by the defendant of a depot for freight and passengers, which the plaintiff reasonably expected would enhance the value of his surrounding lands; whereas the inferior depot erected, with no ticket office or resident agent there located, was not calculated to enlist the persons desirous of locating there to do so. We think Justice Miller pointed out in the quotation of his opinion the true grounds for an interference by the court of equity of specific performance. We do not see any ground upon which to base a criticism of Judge Hudson's decree as indefinite. There are the two depots, the one at Dalzell and the other at Remberts, as models for the depot. An agent is easily supplied. These exceptions are overruled.

It is the judgment of this court, that the judgment of the circuit court be, and hereby is, affirmed.

GARY, J., concurs in the result.

#### WEEKS v. CHICAGO & N. W. RY. CO.

(*Supreme Court of Illinois, Oct. 25, 1902.*)

[64 N. E. Rep. 1039.]

#### Injury to Passenger—Contributory Negligence.\*

On appeal in an action for injuries received by being run over by train the appellate court found that plaintiff was not injured by the negligence of defendant, but by her own negligence, and on appeal to the supreme court plaintiff contended that the finding, in view of the pleadings and evidence, was not sufficient to preclude the supreme court from finding as a matter of law from the evidence that plaintiff was a passenger of defendant when she was injured, and defendant failed to exercise the care required of it for her safety: *held*, that the finding was sufficient, since, even as a passenger, her cause of action was based on the alleged negligence of defendant, which negligence while she was using due care (as such passenger) for her own safety operated to cause the injury.

#### Appeal—Review.

Under Practice Act, § 87, making the judgment of appellate court final as to controverted questions of fact, the appellate court's finding in an action for personal injuries, that there was no negligence on the part of defendant, and that plaintiff was negligent, was final; such questions being ones of fact.

Appeal from appellate court, First district.

Action by Eleanor B. Weeks against the Chicago & North Western Railway Company. From a judgment of the appellate court.

\*See generally, *Bolin v. Chicago, etc., Ry. Co.* (Wis.), 19 Am. & Eng. R. Cas., N. S., 735, and foot-note.

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late court reversing a judgment for plaintiff (99 Ill. App. 518), she appeals. Affirmed.

This case comes into this court upon appeal from the appellate court for the First district. The plaintiff, Eleanor B. Weeks, recovered a verdict in the superior court of Cook county against the Chicago & Northwestern Railway Company for \$10,000. Upon this verdict judgment was rendered, and upon appeal to the appellate court the judgment was reversed, without remanding the cause. On May 17, 1898, Eleanor B. Weeks, the appellant, was a young woman 24 years of age. She was taking a post-graduate course in a school of elocution and oratory at Evanston, near Chicago. Her home was in a suburb of St. Louis. She had relatives living in Ravenswood, a station on the Chicago & Northwestern Railway between Evanston and Chicago. She had visited her relatives once before since the elevation of the tracks on the Northwestern Railroad, and was not sure where she took the train or left it on her previous visit. Aside from this she was not familiar with the Ravenswood station, platform, stairways, and general surroundings at that point. At this time the railway company had elevated its tracks between Chicago and Evanston. The Ravenswood station was located half way between Sunnyside avenue and Wilson avenue, these streets being 75 feet apart. A platform extended the full length of this block on each side of the track. The depot, and its shed or covering for the protection of passengers, was located on the east side. A stairway connected the station directly with the street. There was no covering or station of any sort on the west side; simply a platform used by people in getting off and on the trains. There was no way over the track from the depot to the west side except to cross the track. At this depot there were three tracks,—the west track, then used for running trains north; the east track, for running trains south; and the center track, not then being in use. There was then no fence or obstruction between these tracks, and passengers were in the habit of going across the tracks indiscriminately, between these two points, on taking or leaving trains. At Sunnyside avenue a subway was built under these tracks. This subway had two stairways, one leading up to the east platform, the other to the west platform. These stairways immediately joined the stone abutment on which the viaduct was placed. The lower step was built level with this stone abutment. On going west under the subway one could see the first stairway, but could not see the stairway upon the west side of the tracks, and there was nothing, by way of sign or notice, to inform one seeking to use this stairway that there was another stairway further on which could be used. The Northwestern Railway ran two classes of suburban trains,—express trains that ran from Chicago to Evanston without making a stop, and local trains stopping at all stations on the way. At that time the express trains



and the local trains ran upon the same track. They were alike as to general construction and appearance, differing only in the manner in which they were run. Trains going north ran upon the west track, those going south upon the east track. At this time an express train left the Chicago depot at 5:20, running 40 miles an hour, and running past the Ravenswood station at this rate of speed, not stopping until it reached Evanston, some miles beyond. A local train also left Chicago at 5:20, immediately after the express train, and making three stops before reaching Ravenswood. This train was scheduled to reach Ravenswood and let off and take on passengers at 5:40 p. m., which was just five minutes after the express train passed, which ran over the same track, and left Chicago at the same time. On the 17th day of May, 1898, Eleanor B. Weeks had purchased a return ticket from the Chicago & Northwestern Railway Company at Evanston and had gone to Ravenswood to visit her relatives, who lived several blocks east of the track. She intended to return on the local train leaving the Ravenswood station at 5:40 p. m. About 5:15 Miss Weeks, accompanied by her cousin and another young woman, left the house, and went leisurely down to the station, stopping at several shops along the street. They had no timepiece, but knew that the train was due at 5:40, and started from the house, and made their stops with reference to this time. In this way they reached the corner of Sunnyside avenue and East Ravenswood Park, which is a street 65 feet wide immediately east of the railroad's right of way. The girls stopped for a few moment on the sidewalk on the east side of this street, and were there talking together. Thereupon Miss Weeks looked up, and saw a train approaching from the south, just coming into view. She turned to her companions, and said, "There comes my train." They replied that she had plenty of time to get the train, whereupon she started across the street and up the stairway, being the first one she reached, and in plain view from the street, and thence to the platform on the east side of the track. At this point she suddenly hesitated, looked toward the south, saw the train approaching a block or more distant, still supposing that this was her train, and started to cross the track in a diagonal direction northwest, expecting to reach the west platform at about where the train would stop. But the train proved to be the fast express, running at the rate of 40 miles an hour. As she approached the last track, the whistle blew sharply. She looked up, was frightened, and hastened to go across, tripped, and fell in the middle of the track. She had sufficient presence of mind to pull herself across the track and upon the platform on the opposite side of the track, but too late to prevent the train from running over her ankle, thereby rendering the amputation of her leg necessary. The engineer, seeing her as she hastened across the track, he then being more than one block north of Montrose boulevard. He gave a signal



nal,—a whistle,—which apparently she did not hear, and ran the train another block, within 40 or 50 feet of where the girl was, when he gave another signal, and at the same time put on his brakes and turned off the steam, but it was too late to prevent the accident.

Darrow & Thompson, for appellant.

A. W. Pulver (Lloyd W. Bowers and S. A. Lynde, of counsel), for appellee.

CARTER, J. (after stating the facts). In reversing the judgment without remanding the cause the appellate court made this finding of facts: "The court finds that the injuries received by appellee were not caused by reason of the negligence of appellant, and that appellee was injured by reason of her own want of ordinary care." The first count of the declaration charged that the plaintiff was injured by the defendant while she was crossing its tracks at a public crossing. Other counts charged that she was a passenger of the defendant, and that she was injured by reason of the failure of the defendant to use the care required of a common carrier of passengers for their safety. Counsel for appellant have contended here with much earnestness and at great length that the finding of facts made by the appellate court is not sufficient, in view of the pleadings and the evidence, to preclude this court from finding, as a matter of law, from the evidence, that appellant was a passenger of appellee when she was injured, and that appellee failed to exercise the care required of it for her safety; or, at least, that it was the duty of the appellate court to find, under the issues, whether appellant was such passenger or not, to the end that this court might determine whether the law had been properly applied by the appellate court to such finding of facts. We are unable to agree with counsel on this question. Let it be supposed that the appellate court had found that appellant was in fact a passenger; still, if the court further found that her injury was not caused by any negligence of appellee, but was caused by her own failure to use ordinary care for her own safety, there could be no recovery. Even as a passenger her cause of action was based on the alleged negligence of defendant, which negligence, while she was using due care (as such passenger) for her own safety, operated to cause the injury. The appellate court is not required to recite the evidence, or to find the mere evidentiary facts, but only to find the ultimate facts. *Rogers v. Railroad Co.*, 117 Ill. 115, 6 N. E. 889. In the case cited, and in *Borg v. Railway Co.*, 162 Ill. 348, 44 N. E. 722, the finding of such ultimate facts was not more specific, but was substantially the same as the finding in the case at bar. We have no doubt that the finding was sufficient, under the statute and the decisions of this court, upon which to base the judgment which the appellate court rendered.

Nor can we agree with appellant's counsel that the facts

were uncontroverted, and that from such uncontroverted facts the appellee's liability appears as a conclusion of law. It was clearly a controverted question of fact whether appellant used due care for her own safety in crossing the railroad track in front of the approaching train; and this would be even if she sustained the relation to appellee of passenger. It was equally a controverted question of fact whether appellee was guilty of negligence in the running and management of its train under all of the circumstances, and the power to find and settle such controverted questions of fact is vested in the appellate court, and not in this court; and this is so in cases even where it may appear to us that an erroneous view has been taken of the evidence by the appellate court. It is not, of course, meant to be said that, had the evidence been such that under the decisions of this court and the rules which have been established it would have been the duty of the trial court to direct a verdict for the plaintiff, the appellate court would have had the power to find the facts differently from what the record showed them to be (if such a finding could be imagined), and by such finding preclude a review in this court; for by the eighty-seventh section of the practice act the judgment of the appellate court in such cases is made final and conclusive only "as to all matters of fact in controversy in such cause." If there is no controversy "as to matters of fact in the case" (and matters of fact include all inferences of fact deducible from the facts proved), then the question of law remains for final review in this court, when properly preserved and presented, whether the judgment is erroneous or not on the uncontroverted facts in the case; and it is upon this view of the case that we can consider as applicable the argument of appellant's counsel that this court can go behind the finding of facts of the appellate court, and determine from the evidence contained in the record whether or not it supports the judgment of the appellate court. No case has ever arisen, to our knowledge, nor can we suppose that one ever will arise, where the appellate court has found or will find, the facts to be different from what they were found in the trial court, where there was no controversy as to such facts, nor as to the inferences of fact to be drawn from the facts proved, admitted or agreed upon. Cases have arisen where, from a state of facts agreed upon, the appellate court has drawn conclusions of fact different from those of the trial court, and has, in consequence, rendered a different judgment. See *Seeberger v. McCormick*, 178 Ill. 404, 53 N. E. 340. But in the case at bar, as we have seen, the question whether the plaintiff was exercising proper care for her own safety in crossing the track in front of appellee's approaching train was, under all of the circumstances, one of fact; and so, also, is the one whether appellee's engineer, seeing appellant crossing the track in front of his engine, was guilty of negligence in not bringing his engine under such immediate

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control as to prevent the collision. It is not denied that he gave signals of warning, nor that the plaintiff persisted in her attempt to cross, thinking, no doubt, that the train was the one she intended to take, and that it would approach the station slowly, and come to a stop there,—an erroneous conclusion of her own. The power to finally determine the facts in such a case is vested in the appellate court, and we cannot review such finding. There is no contention that the judgment of the appellate court is not the proper one on the facts found, and, it appearing that the finding made is legally sufficient, no other question is open for review in this court. The judgment must be affirmed. Judgment affirmed.

# PALMER v. WINSTON-SALEM RY. & ELECTRIC CO.

(*Supreme Court of North Carolina, Nov. 11, 1902.*)

[42 S. E. Rep. 604.]

**Carriers of Passengers—Assault on One Who Had Been a Passenger—Provocation—Mitigation of Damages.**

In an action for assault by a motorman on plaintiff, who had been a passenger on a street car, the fact that plaintiff provoked the assault was not a defense, but was relevant only to mitigate damages.

**Same—Same—Liability.\***

Where a passenger on a street car got into an altercation with the motorman, and after alighting from the car and depositing certain bundles, which he carried on the sidewalk, returned to the car, whereupon the motorman left the car and assaulted plaintiff in the street, plaintiff was not entitled to recover, as against the company, for such assault; it not being committed by the motorman while he was acting within the scope of his employment on the car.

Appeal from superior court, Forsyth county; Coble, Judge.

Action by Alfred Palmer against the Winston-Salem Railway & Electric Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Glenn, Manly & Hendren and Watson, Buxton & Watson, for appellant.

Jones & Patterson, for appellee.

CLARK, J. The plaintiff, while a passenger on the street car of the defendant, and somewhat intoxicated, used grossly insulting words to the motorman. Arrived at his destination, the plaintiff got out, deposited his bundles on the sidewalk, returned to the car, again got into an altercation with the motorman, turned, and left the car, whereupon the motorman followed him up, and, two or three steps from the car, struck the plaintiff on the back of the head with the lever which controlled the car, knocking him down.

The fact that the plaintiff invited the assault by insulting language or provoking conduct would not bar recovery in a

\*See monograph appended to Birmingham Ry. & Electric Co. v. Faird (Ala.), 22 Am. & Eng. R. Cas., N. S., 909.



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civil action, not even when the parties fight by consent. *B. v. Hansley*, 48 N. C. 131; *Williams v. Gill*, 122 N. C. 967, S. E. 879; *Cooley*, *Torts* (2d Ed.) pp. 183, 187, 190. The rule in criminal actions is that no words, however violent and insulting, justify a blow, but, if a blow follows, both are guilty though the party giving the insult strikes no blow. The insult is not a defense, but matter in mitigation of punishment. In a civil action, if the provocation is great, the jury will usually see fit to return nominal or small damages; and, if the amount is less than \$50, the plaintiff recovers no more costs than damages. Code, § 525 (4). In the civil as in the criminal action, the provocation is a mitigation, not a defense.

The only question which remains is as to the liability of the defendant for the assault upon the plaintiff. If the plaintiff had been a passenger, or his passage had not been fully terminated, or if, when he left the car at his destination, the employee had immediately followed the passenger up and assaulted him, the defendant concedes that there would be no question as to the liability of the company. *Daniel v. Railroad Co.*, 117 N. C. 592, 23 S. E. 327; *Williams v. Gill*, 122 N. C. 967, 29 S. E. 879; *Strother v. Railroad Co.*, 123 N. C. 197, 31 S. E. 386, 12 Am. & Eng. R. Cas., N. S., 121. Here the passage had terminated for the passenger had deposited his bundle and then returned to the car. *Railway Co. v. Peacock* (Md.) 14 Atl. 709, 9 Am. St. Rep. 425; *Railroad Co. v. Boddy* (Tenn.) 58 S. W. 646, 51 L. R. A. 885; *Creamer v. Railroad Co.* (Mass.), 52 Am. & Eng. R. Cas. 558, 31 N. C. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456; *Railway Co. v. Bates*, 103 Ga. 333, 30 S. E. 41. But the plaintiff insists, however, that the defendant is liable, notwithstanding, if the motorman assaulted the plaintiff while acting in the scope of his employment. The court so charged, and the exception was overruled, that the evidence as above stated did not justify submitting that matter to the jury. In *Pierce v. Railroad Co.*, 124 N. C. 83, 32 S. E. 399, 13 Am. & Eng. R. Cas., N. S., 666, 1 L. R. A. 316, the fireman threw a lump of coal at a boy stealing a ride on the tender of a switching engine, in violation of a town ordinance, knocking him from the engine or frightening him so that he fell and was run over and killed by the engine, which was running backwards. In *Cook v. Railway Co.*, 128 N. C. 333, 38 S. E. 925, a tramp was stealing a ride under a car. A flagman and a brakeman threw rocks at him, striking the rod under him, frightening him and causing him to get off while the car was in motion, whereby his foot was caught and he was badly hurt. In *Brendle v. Spencer*, 128 N. C. 474, 34 S. E. 634, the plaintiff was watering his team at a stream; and the engineer on a train passing on a bridge above wantonly blew his whistle for the purpose of frightening the plaintiff's horses, which ran away, throwing the plaintiff out of his wagon and injuring him. In none of these cases was the plaintiff a passenger, and in the first two he was

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trespasser, and in all three the company was held responsible. But this was because the servant of the company was "acting in the scope of his employment" (i. e., on duty as servant) when the tort was committed. But here the plaintiff was neither a passenger, nor was the employee acting within the scope of his employment. The court should have told the jury that, taking the evidence most strongly for the plaintiff, they should answer the first issue, "No." The employee in this case had left the car, and was not engaged in any work or employment for the company at the time of the assault. He had, for the time being, abandoned his post, and was not doing service for the company, as in each of the three cases last cited. The assault was not made while the motorman was in the line or in the discharge of his duty. 20 Am. & Eng. Enc. Law, 168, note 1; Id. 169; 1 Thomp. Neg. §§ 525, 526. If the plaintiff's contract of passage had not terminated, and the plaintiff had been assaulted, while on the car or upon leaving it, by an employee, then the company would be liable, whether the employee was acting within the scope of his employment at the time or not; for, as was said in *Cook v. Railway Co.*, 128 N. C., at page 336, 38 S. E. 925, it can never be in the scope of an employee's service to assault any one wrongfully. "Acting within the general scope of his employment" means while on duty." Id. This is the limitation upon the liability of the company for torts of its employees towards those not passengers or under the protection of the contract of safe carriage at the time of the tort. The law can hardly be better summed up than in the following extract from the brief of the learned counsel for the defendant: "To render the defendant liable, (1) the plaintiff must have been a passenger on defendant's car at the time he was stricken, or still within the sphere of its protection; or (2) the employee must have been acting at the time within the scope of his employment on defendant's car."

New trial.

## TRAVELERS' INS. CO. v. AUSTIN.

(*Supreme Court of Georgia, Aug. 8, 1902.*)

[42 S. E. Rep. 522.]

## Accident Insurance—Who Are Passengers—Railroad Paymaster.\*

A paymaster of a railroad company traveling upon business of the company from station to station on the line of the company, and stopping between stations for the purpose of paying off employees of the company wherever they may be, is not, while so doing, a "passenger," within the meaning of a clause in a policy of accident insurance granting double indemnity to the insured if injured while riding as a passenger on a passenger car using steam as a motive power.

\*As to who are passengers, see foot-note appended to *Rathbone v. Oregon R. Co.* (Ore.), 1 R. R. R. 511, 24 Am. & Eng. R. Cas., N. S., 511.



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**Same—Pay Car Not a Passenger Car.**

A coach specially equipped and used as a pay car, and not a vehicle for the transportation of passengers, is not, in contemplation of the contract alluded to in the preceding headnote, a passenger car; and this is so although it had formerly been used as a passenger car, and was capable of being so used again.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action by A. V. Austin against the Travelers' Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

Dassan, Harris & Harris, for plaintiff in error.

Roland Ellis and Robt. Hodges, for defendant in error.

FISH, J. The plaintiff in error issued to Austin, the deceased husband of the defendant in error, an accident insurance policy, which provided for the payment of certain indemnities in the event of accidental injuries to the insured, and of \$5,000 to his widow in case of his death as a result of such injuries. The policy contained a stipulation that, "if such injuries are sustained while riding as a passenger, and being actually in or upon any railway passenger car using steam, cable, or electricity as a motive power, \* \* \* the amount to be paid shall be double the sum specified in the clause under which claim is made." Austin was paymaster and cashier of a railroad company. It was his duty to pay the salaries of the employees of the company, and to that end he made periodical trips over the line of the car railroad, what was known as a "pay car." This car had originally been one of the regular sleeping cars in use on the railroad, but had been altered so as to make it serve the purpose before indicated. It was described by one of the witnesses as follows: "In the front end there was a cooking stove, and all of the things for cooking. In the center of the car there were regular Pullman berths to sleep twelve people; and in the observation end, which we used for paying off, it had two large windows and a settee, and some nice chairs, and a table that we used for a dining table. In the part exclusive of the kitchen and observation end, where the money was paid off, there were regular seats, the same that any other passenger sleeping car has." It was also equipped with an iron safe in which money was kept, and with guns and ammunition for the protection of the property in the car. On occasions the equipment of the car was changed, and it was put into service as a regular sleeping car. The pay train did not run on a regular schedule, but stopped at any station or between stations, wherever it was necessary to pay out money. Austin would frequently count out money between stations, preparatory to paying it at the next stop. While on one of the trips the pay car was derailed and overturned, and a man hanging in a rack in a car was thrown to the floor and d

charged, killing Austin. His widow demanded double indemnity under the clause of the policy before quoted. This was refused, and she brought suit for \$10,000. The insurance company, in its answer, admitted liability for \$5,000, and made a tender of that amount in full of all claims against it, which was refused, and the case went to trial. There was practically no conflict in the testimony of the witnesses, the material portions of which have been substantially set out above; the only evidence introduced by the insurance company being an extract from the proof of death submitted by Mrs. Austin, to the effect that the injury which caused her husband's death was received while he was engaged in discharging his duties as cashier and paymaster of the Georgia Southern & Florida Railroad Company. At the conclusion of the evidence, counsel for the defendant made a written motion to direct a verdict in its favor on the controlling issue in the case, viz., the right of the plaintiff, under the evidence, to recover double indemnity. This motion was denied, and the case went to the jury, who found for the plaintiff the full amount sued for. The defendant made a motion for a new trial, which was overruled, and it excepted.

1. From the foregoing it will be seen that the single question presented for determination by this case is whether or not, under the admitted facts, Austin was, at the time of receiving the injuries which caused his death, riding as a passenger upon a railway passenger car, within the meaning of that clause of his policy of insurance, which provided that he should receive double indemnity in the event that he should be accidentally injured or killed while so riding. This question may be subdivided into two branches: First, was he a passenger? and second, was the car in which he was riding a passenger car? "A passenger, in the legal sense of the term, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as to the payment of fare, or that which is accepted as an equivalent therefor." 5 Am. & Eng. Enc. Law (2d Ed.) 486. "One may be both a passenger and an employee of a railroad company,—an employee when passing over the road at a time when actually engaged in performing duties for the company, but a passenger while not so engaged, but riding from one place to another, even though continuing all the while, in a popular sense, in the employ of the company." Id. 516. It is not denied that Austin was an employee of the railroad company at the time he was killed. The question is, was he also a passenger? The mere fact that he was not a part of the operating force or train crew engaged in the act of propelling the train does not, as seems to be contended by counsel for the defendant in error, invest him with that character. He was certainly "passing over the road at a time when actually engaged in performing duties for the company." His case cannot be analogized to that of an official or an attorney who

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travels over the road for the purpose of reaching a point where duties are to be performed for the company, and who, while so traveling, is engaged in the performance of no duty whatever. While the pay train was going from one station to another, the paymaster was as much on duty as the flagman of a passenger or freight train, whose sole duty is to keep a lookout for other trains when the train on which he is riding has stopped between stations. In the case of *Prather v. Railroad Co.*, 80 Ga. 427, 9 S. E. 530, 12 Am. S. Rep. 263, the deceased husband of the plaintiff was one of the gang employed on the defendant's material train to load and unload cars, and it was his duty "to do anything to insure the careful working of the train." He was killed while the train was moving from one point to another, and at a time when he had no active duty to perform. The question arose whether or not he was a co-employee of those who were actually operating the train. This question was decided in the affirmative, our present chief justice, who delivered the opinion, using the following language, which we think is directly applicable to the case at bar: "The fact that he had no active duty to perform while riding from one point of work to another did not make him any the less an employee during those times. He could not be an employee whilst at work at one mile post, and, having finished there, get on the car to go to the next mile post, and while riding the mile become a passenger, and at the end of the mile become an employee again." If the reasoning there employed be correct, the case cited settles beyond all question that Austin was not, in legal contemplation, a passenger; and hence that his widow is not entitled to recover the double indemnity for which she sues. This view is not in conflict with any of the cases cited in the brief of counsel for the defendant in error. A case upon which special stress seems to be laid is that of *Berliner v. Insurance Co.*, 121 Cal. 458, 53 Pac. 922, where the supreme court of California held that the plaintiff was entitled to recover double indemnity under a clause in a policy of accident insurance almost identical with the one now under consideration, although the insured, at the time of the accident, was an invitation of an officer of the railroad company, was riding upon the engine of the train on which he was traveling; being ruled that the fact of his riding upon the engine did not deprive him of his character of passenger. That case, however, cannot properly be compared to the one now under consideration, because the relationship of the insured to the railroad company in the two cases was widely different. Berliner, so far as appears from the published report, was not employed by or connected with the railroad. Apparently he had paid his fare before beginning his journey. The court in that case takes special occasion to say, on page 465, 121 Cal. and page 921, 53 Pac., that, if he had been riding on the train as an employee of the railroad company, the in-

insurance company would not be liable under the clause providing for double indemnity. In the case of *Jones v. Railway Co.*, 125 Mo. 666, 28 S. W. 883, 26 L. R. A. 718, 46 Am. St. Rep. 514, it was held that the porter of a Pullman sleeping car occupied the position of a passenger of the railroad company in respect to the careful running and management of the train; but in that case the porter was not employed by the railroad company, as the paymaster in this case. On the other hand, in the well-considered case of *McQueen v. Railway Co.*, 30 Kan. 689, 1 Pac. 139, it was held that a plaintiff in the employment of a railroad company, painting depots, bridges, tanks, and switches along the line of the road, and who was transported over the road, to discharge the duties of his employment, in a small steam car used only by officers and employees of the railroad company, was not a passenger within the true sense of that term, nor entitled to the rights of a passenger. That case is in principle directly parallel with the case now before us, and, while not binding on us, its reasoning is satisfactory to us as authority for the position that we take. To the same effect, see *Railway Co. v. Salmon*, 11 Kan. 83. The reason for making a distinction in the contract of insurance between passengers riding as such and employees of a railroad company in the discharge of their duties is not far to seek. The law throws greater protection around passengers than employees, and requires of railroad companies greater diligence in providing for their safety. Consequently the risk of insuring a passenger is not so great as that of insuring an employee. With this in view, the true test to be applied to determine whether one injured in a railroad accident can recover from an insurance company double indemnity is to inquire whether, presuming that a right of action exists against the railroad company, the plaintiff would be entitled to sue that company in the capacity of a passenger or an employee. In *Austin's Case* to ask that question is to answer it, for it is clear that the railroad company owed him no other duty than that of employer to employee, and, if liable to his widow, is only so on the ground of that relationship.

2. The evidence shows that the car in which Austin was riding at the time of the accident was a coach specially equipped for use by the officers and employees of the railroad company as a pay car. It was not in any sense a passenger car, within the meaning of the contract of insurance, any more than a mail or baggage car could be so considered. It was used for a particular purpose, and that purpose was not the transportation of passengers. That it had formerly been used as a passenger car, and was capable of being so used again, can make no difference, in view of the fact that at the time of the accident it was used for an altogether different object. The testimony of a witness that it was a passenger car was improperly admitted, being merely his conclusion



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from a given state of facts, and is unavailing in the face of other evidence, which described the car in detail, and negatived such a conclusion.

The foregoing disposes of the case on its merits favorably to the contentions of the plaintiff in error. It follows that the charges of the court which were not in consonance with the principles here laid down were erroneous; that the trial judge should have directed a verdict in favor of the insurance company as to the double indemnity; and that the verdict returned for the plaintiff for the full amount sued for was contrary to law and the evidence, and should have been set aside on motion for a new trial.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

### WRIGHT'S ADM'R v. SOUTHERN RY. CO.

(*Supreme Court of Appeals of Virginia, Dec. 11, 1902.*)

[42 S. E. Rep. 913.]

#### Rules—Duty of Master.\*

It is the duty of a railroad company to adopt, promulgate, and enforce reasonable rules to promote the safety of its employees.

#### Same—Disregard—Notice.

Though a railroad company adopted certain rules as to the use of flags in the repair yards to protect employees working under the cars, where the evidence showed that the rules were uniformly and continuously disregarded, with the knowledge of those in charge of the repair shops, it warranted a finding imputing knowledge of the condition of the affairs in this respect to the railroad company, of a want of ordinary care on its part if it remained in ignorance of such disregard of its rules.

Error to circuit court, Brunswick county.

Action by the administrator of J. W. Wright against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Everett Perkins, E. P. Buford, and C. V. Meredith, for plaintiff in error.

A. P. Thom, for defendant in error.

KEITH, P. This is a writ of error to a judgment of the circuit court of Brunswick county in an action of trespass brought to recover damages for the death of J. W. Wright, who was employed as a car repairer in the shops of the Southern Railway Company. At the trial the defendant demurred to the plaintiff's evidence, the jury rendered a verdict in favor of the plaintiff for \$5,000, upon which the court entered judgment upon the demurrer for the defendant, and the case is before us upon a writ of error.

The defendant worked as car repairer in the car sheds of the defendant in error, into which ran a number of tracks upon

\*See notes at end of case.



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which cars needing repair were placed. It is in proof that from 700 to 800 cars, to say nothing of other machinery, were annually repaired in the shops, necessitating the employment of a large number of workmen. J. W. Wright was at work upon track No. 3, aiding in making repairs to the drawhead of a car. In order to perform the duty assigned him, he was in the middle of the track, in a crouching position, in front of the drawhead, when a shifting engine which was being coupled to a car struck and set in motion a car between the one in the repair of which Wright was engaged and that to which the coupling was being made, and drove it down the track, striking Wright and crushing him in such a manner that he shortly thereafter died.

It is charged that the railway company was negligent in failing to adopt, promulgate, and enforce proper rules and regulations for the guidance and control of its operatives engaged in the hazardous duties incident to employment in repair shops.

That it is the duty of a railroad company to exercise ordinary care to furnish reasonably safe appliances and instrumentalities for the protection of its employees, and to adopt, promulgate, and enforce reasonable rules to promote their safety, there can be no question. If authority for this proposition be needed, it will be found in *Shear. & R. Neg.* (5th Ed.) § 202:

"A master who employs servants in a dangerous and complicated business is personally bound to prescribe rules sufficient for its orderly and safe management, and to keep his servants informed of these rules, so far as may be needful for their guidance. Thus a railroad company is bound to regulate, by published rules, the time and manner of running its trains, so as to avoid collisions, and to enable all its servants to know when a train may be expected, and thus to avoid danger. And a jury may find that it ought to have rules to protect men working underneath cars from the starting of such cars without due warning. The master is also bound to use ordinary care and diligence to enforce the rules which he has made, and disregard of such rules, with his acquiescence or neglect to enforce them, is tantamount to a suspension of the rules. A jury has no general right to find that a rule should have been adopted, without sufficient evidence that such rule was necessary and practicable."

That the jury were warranted, from the evidence, in finding in this case that it was the duty of the railroad company to adopt such rules, appears from the facts already stated. The evidence sufficiently shows a compliance upon the part of the railroad company with so much of its duty as required the adoption of rules. The evidence as to their promulgation is by no means so satisfactory, and a jury might have been warranted, upon that point, in finding that the rules relied upon were never so published as to bring them home to the plain-

tiff's intestate, and upon a demurrer to evidence, if that were all, it might have been the duty of the court to sustain the verdict; but with respect to the failure upon the part of the railroad company to enforce its rules, granting that they were duly adopted and promulgated, the evidence discloses a state of facts which well warranted a jury in finding that the railroad company had been negligent.

Without going into the details of the testimony of witnesses upon this point, it sufficiently appears from the evidence of Spain and Edwards that the rules were disregarded so uniformly and continuously, with the knowledge and practical acquiescence of those in charge of the repair shops, as to warrant a jury in imputing knowledge of the condition of affairs in this respect to the railroad company, or a want of ordinary care upon its part in the performance of its duties if it remained in ignorance of a disregard of its rules so general and long continued.

W. J. Spain, foreman of car repairs of the Southern Railway Company at Lawrenceville,—a witness on behalf of the defendant,—speaking of the use of flags, was asked:

"Did you ever call any of the car repairers' attention to the fact that the flags were missing? A. Yes, sir; I threatened to discharge them for not having the flags up. Q. In other words, you did what you could to enforce the rule? A. Exactly."

On cross-examination he was asked: "Did you ever furnish the rule to these people?" To which he replied: "No, sir; not until recently. Q. Before Mr. Wright's death, which occurred on the 14th of January, 1900, the rules of the company were not furnished to the car repairers? A. They were not to the men, but they were furnished to inspectors and foremen on November 14, 1899. Q. You have stated there was great laxity about the use of flags among the employees? A. It was not permitted, and, as I stated before, we had threatened time and again to discharge men for being so careless about the use of flags. Q. Whether you threatened or not, it prevailed? A. It did in a measure; yes, sir."

R. S. Edwards, an inspector of repairs, employed at these shops,—a witness introduced on behalf of defendant,—speaking of the rule which had been adopted for the protection of car repairers, was asked: "Didn't you know well that this rule of the company had not been observed on the part of these car repairers; that they had never observed it, and that they were very ill-provided with flags? A. Well, I know there had been no rule read to the men, but the use of the flags had been there, and they had been using flags. Q. There had been a mighty lax and careless use of the flags? A. They were not as particular as they should have been. Q. Didn't each foreman suffer this laxity in the use of the flags? A. Yes, sir; it seemed to be a hard matter to make them keep the flags up. Q. And so hard they hadn't tried to enforce

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the rule? A. I always tried to discharge my duty. If I saw him in danger I told him of it."

There is some evidence that the flags had been, a good while before the date of the accident, distributed to the men, with instructions to place them when at work in repairing a car on that end of the car from which the approach of danger was to be apprehended; that, when the flag was so placed, it could not be removed except by the workman who had put it there, or with his knowledge and consent, and the car upon which it was placed could not be moved. But the evidence further is that those flags had, in great measure, disappeared; that those which remained had become so dirty and worn as to be indistinguishable, and their use, as we have seen, had fallen into practical abeyance. There is evidence tending to prove that a short time before the accident the intestate, who had gone to Edwards to get some supply connected with the work in which he was engaged, was told by him that he was going to do some shifting, and to look out; but it affirmatively appears that Wright was not told that the shifting engine was going on repair track No. 3, where he was at work, but only in a general way Edwards told him that he "was going over where he was to do some shifting." It is further proved that the custom on the part of Edwards as to walk down the repair track in advance of the shifting engine, and personally notify those who were engaged in repairing cars upon that track.

Without going further into the testimony, enough has been said to show that the judgment of the court sustaining the demurrer was erroneous. There was evidence sufficient to warrant the jury in finding that the railroad company had not exercised ordinary care in enforcing its rules for the orderly and safe management of a dangerous and complicated business.

The judgment of the circuit court must be reversed, and this court will enter such judgment as it ought to have rendered.

## NOTES.

# DUTY OF RAILROAD COMPANIES TO PRESCRIBE RULES FOR THE PROTECTION OF THEIR EMPLOYEES.

## I. In General.

- A. General Rule.
- B. Other Statements of General Rule.
- C. Illustrations of General Rule.
  1. Collisions.
  2. Moving Cars on Switch Track.
  3. Hand Cars—Collisions.
  4. Loading and Unloading Ship.
  5. Loading Lumber.
  6. Kicking Cars.
  7. Protection of Repairers.
  8. Starting Trains.
  9. Timber Chutes.
  10. Working in Salt Bins.

## II. Limitations of and Exceptions to General Rule.

- A. Degree of Care.
  1. Ordinary Care.

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2. Only Ordinary Care.
3. Reasonable Care.
4. Reasonable Protection.
5. So Far as Practicable.
6. High Degree of Care to Avoid Collisions.
- B. Practice in Force Sufficient.
  1. Moving Detached Cars in Yards.
  2. Railroad Yards—Lookouts.
  3. Use of Conductor's Valves.
  4. Wild Trains.
- C. Danger Obvious or Business Not Complex.
  1. Backing Cars at Water Tank.
  2. Cars Obstructing Crossing.
  3. Collision at Lime Kiln.
  4. Loading Cars.
  5. Moving Cars on Siding.
  6. Operation of Freight Yards.
  7. Taking Ties from Pile.
  8. Sawyers.
- D. Practice of Others Railroads.
  1. Absence of Evidence as to Practice of Other Companies.

## I. IN GENERAL.

## A. GENERAL RULE.

In some of the decisions it is stated that performance of this duty involves the exercise of a "high degree of care" on the part of the master; in others that "ordinary care," or "only ordinary care" is required. But, notwithstanding this lack of uniformity, it will be found from an examination of the authorities that the rule supported by them is that a master employing servants in a complex and dangerous business like railroading must use ordinary care to prescribe rules for the conduct of the business which, if observed, will afford them reasonable protection. And this care is to be also measured by the exigencies of each particular case.

*United States.*—*Baltimore & O. R. Co. v. Camp*, 31 U. S. App. 213, 65 Fed. 952, 13 C. C. A. 233; *Northern Pac. R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 4 L. Ed. 994; *Crew v. St. Louis, etc., R. Co.*, 20 Fed. 87; *Fletcher v. Baltimore, etc., R. Co.*, 168 U. S. 135, 18 Sup. Ct. 35.

*Alabama.*—*Louisville, etc., R. Co. v. Orr*, 91 Ala. 548, 8 So. 360.

*Arkansas.*—*Kansas City, etc., R. Co. v. Hammond*, 58 Ark. 324, 24 S. W. 723; *St. Louis, etc., R. Co. v. Triplett*, 54 Ark. 289, 15 S. W. 831, 48 Am. & Eng. R. Cas. 283; *Fordyce v. Briney*, 58 Ark. 206, 24 S. W. 250.

*Colorado.*—*Chicago, etc., R. Co. v. McGraw*, 22 Colo. 363, 45 Pac. 383.

*Connecticut.*—*Zeigler v. Danbury, etc., R. Co.*, 52 Conn. 552.

*Delaware.*—*Murphy v. Hughes*, 1 Penn. 250; *Rex v. Pullman's Palace Car Co.*, 2 Marv. (Del.), 337, 43 Atl. 246.

*Georgia.*—*Shelton v. O'Brien*, 76 Ga. 821.

*Illinois.*—*Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 109; *Chicago, etc., R. Co. v. Taylor*, 69 Ill. 461, 18 Am. Rep. 626; *Chicago, B. & Q. R. Co. v. Young*, 26 Ill. App. 115; *Pittsburg, Ft. W. & C. R. Co. v. Powers*, 74 Ill. 341; *Wenona Coal Co. v. Holmquist*, 51 Ill. App. 507; *Chicago, B. & Q. R. Co. v. George*, 19 Ill. 510; *Chicago & A. R. Co. v. McDonald*, 21 Ill. App. 409.

*Indiana.*—*Evansville, etc., R. Co. v. Holcomb*, 9 Ind. App. 198, 36 N. E. 39; *Cincinnati, I. St. L. & C. R. Co. v. Lang*, 118 Ind. 579, 21 N. E. 317; *Sheets v. Chicago & I. Coal R. Co.*, 139 Ind. 682, 39 N. E. 154.

*Iowa.*—*Gould v. Chicago, B. & Q. R. Co.*, 66 Iowa 590, 24 N. W. 227; *Cooper v. Iowa Cent. R. Co.*, 44 Iowa 134.

*Kansas.*—*Kansas Pac. R. Co. v. Salmon*, 14 Kan. 512.

*Maine.*—*Judkins v. Maine Cent. R. Co.*, 80 Me. 417, 14 Atl. 735.

*Maryland.*—*Baltimore, etc., R. Co. v. State*, 41 Md. 268; *Baltimore, c., R. Co. v. Woodward*, 41 Md. 268.



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*Michigan*.—Enright *v.* Toledo, A. A. & N. M. R. Co., 93 Mich. 409, 53 N. W. 536.

*Minnesota*.—Olson *v.* St. Paul, M. & M. R. Co., 38 Minn. 117, 35 N. W. 866.

*Missouri*.—Foster *v.* Missouri Pac. R. Co., 115 Mo. 165, 21 S. W. 916; Reagan *v.* St. Louis, etc., R. Co., 93 Mo. 348, 6 S. W. 371, 3 Am. St. Rep. 542; Rutledge *v.* Missouri Pac. R. Co., 110 Mo. 312, 19 S. W. 38, 123 Mo. 121, 24 S. W. 1053; Relyea *v.* Kansas City, Ft. S. & G. R. Co., 112 Mo. 86, 20 S. W. 480, 18 L. R. A. 817; Schroeder *v.* Chicago, etc., R. Co., 108 Mo. 322, 18 S. W. 1094; Francis *v.* Kansas City, St. J. & C. B. R. Co., 53 Am. & Eng. R. Cas. 410, 110 Mo. 387, 19 S. W. 935.

*New York*.—Wright *v.* New York Cent. R. Co., 25 N. Y. 562; Sutherland *v.* Troy & B. R. Co., 125 N. Y. 737; Haskin *v.* New York Central, etc., R. Co., 65 Barb. (N. Y.) 129; Carr & N. *v.* North River Const. Co., 48 Hun 266; Rose *v.* Boston, etc., R. Co., 58 N. Y. 217; McGovern *v.* Central Vermont R. Co., 123 N. Y. 280, 25 N. E. 373; Forey *v.* Syracuse, etc., R. Co. 12 N. Y. St. Rep. 198, 46 Hun 678; Ford *v.* Lake, etc., R. Co., 124 N. Y. 493, 26 N. E. 1101, 48 Am. & Eng. R. Cas. 201, 117 N. Y. 638, 27 N. Y. St. Rep. 246; Dana *v.* New York Cent., etc., R. Co., 92 N. Y. 639; Slater *v.* Jewett, 85 N. Y. 61, 39 Am. Rep. 627; Sheehan *v.* New York Cent., etc., R. Co., 91 N. Y. 332; Corcoran *v.* Delaware, etc., R. Co., 4 Silv. App. (N. Y.) 483; Tully *v.* New York & T. S. S. Co., 10 App. Div. 463, 42 N. Y. Supp. 29, 27 N. E. 855, 12 L. R. A. 454; Campbell *v.* New York Cent., etc., R. Co., 35 Hun (N. Y.) 506; Whittaker *v.* Delaware & H. Canal Co., 126 N. Y. 544, 27 N. E. 1042; Berrigan *v.* New York, etc., R. Co., 131 N. Y. 582, 30 N. E. 57; Abel *v.* Delaware, etc., Canal Co., 103 N. Y. 581, 57 Am. Rep. 773, 9 N. E. 325, 28 Am. & Eng. R. Cas. 497; Besel *v.* N. Y. Cent. & Hudson River R. R. Co., 70 N. Y. 191; Bushby *v.* New York, etc., R. Co., 107 N. Y. 374, 37 Hun (N. Y.) 104, 14 N. E. 407; Hankins *v.* New York, L. E. & W. R. Co., 142 N. Y. 416, 37 N. E. 466, 25 L. R. A. 396; Doing *v.* New York, etc., R. Co., 151 N. Y. 579, 45 N. E. 1028; Ely *v.* New York Cent., etc., R. Co., 88 Hun (N. Y.) 323; Flike *v.* Boston, etc., R. Co., 53 N. Y. 549, 13 Am. Rep. 545; Mulvaney *v.* Brooklyn City R. Co., Brooklyn City Ct. Gen. T. 1 Misc. (N. Y.) 425; Warn *v.* New York Cent. R. Co., 80 Hun (N. Y.) 71; Morgan *v.* Hudson River Ore, etc., Co., 133 N. Y. 666, 31 N. E. 234; Nary *v.* New York, O. & W. R. Co., 9 N. Y. Supp. 153.

*Ohio*.—Dick *v.* Indianapolis C. & L. R. Co., 38 Ohio St. 389; Lake Shore & M. S. R. Co. *v.* Toplift, 2 Ohio Dec. 522, 6 Ohio Cir. Dec. 234; Lake Shore, etc., R. Co. *v.* Lavalley, 36 Ohio St. 221, 5 Am. & Eng. R. Cas. 549; Lake Shore & M. S. Ry. Co. *v.* Murphy, 50 Ohio St. 135, 33 N. E. 403.

*Oregon*.—Anderson *v.* Bennett, 16 Ore. 529, 19 Pac. 769; Nutt *v.* Southern Pac. Ry. Co., 25 Ore. 294, 35 Pac. 653; Knahtla *v.* Oregon Short Line, etc., R. Co., 21 Ore. 143, 27 Pac. 91; Wild *v.* Oregon Short Line, etc., R. Co., 21 Ore. 159, 27 Pac. 954.

*Pennsylvania*.—Lewis *v.* Seifert, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. Rep. 631.

*Texas*.—Texas, etc., R. Co. *v.* French (Tex. Civ. App.), 22 S. W. 866; Texas, etc., R. Co. *v.* Cumpston, 15 Tex. Civ. App. 493, 40 S. W. 546; International, etc., R. Co. *v.* Hinzie, 82 Tex. 623, 18 S. W. 681; Houston & T. C. R. Co. *v.* Strycharaki, 6 Tex. Civ. App. 555, 26 S. W. 253; Missouri Pac. R. Co. *v.* McElyea, 71 Tex. 386, 9 S. W. 313, 10 Am. St. Rep. 749; Galveston, H. & S. A. R. Co. *v.* Smith, 76 Tex. 611, 13 S. W. 562; Galveston, H. & S. A. R. Co. *v.* Croskell, 6 Tex. Civ. App. 160, 25 S. W. 486; Gulf, etc., R. Co. *v.* Finley, 11 Tex. Civ. App. 64, 32 S. W. 51; Texas & N. O. R. Co. *v.* Echols, 87 Tex. 339, 27 S. W. 60; International, etc., R. Co. *v.* Hall, 78 Tex. 657, 15 S. W. 108.

*Utah*.—Pool *v.* Southern Pac. R. Co., 20 Utah 210, 16 Am. & Eng. R. Cas., N. S. 551.

*Virginia*.—Richlands Iron Co. *v.* Elkins, 90 Va. 249, 17 S. E. 890; Moore Lime Co. *v.* Richardson, 95 Va. 326, 28 S. E. 334.

*West Virginia*.—Turner *v.* Norfolk & W. R. Co., 40 W. Va. 675, 22 S.



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E. 83; *Madden v. Chesapeake, etc.*, R. Co., 28 W. Va. 610, 57 Am. Rep. 695; *Oliver v. Ohio River R. Co.*, 42 W. Va. 703, 26 S. E. 444.

*Wisconsin*.—*Luebke v. Chicago, etc.*, R. Co., 59 Wis. 127, 17 N. W. 870, 48 Am. Rep. 483.

*England*.—*Vose v. Lancashire & Y. R. Co.*, 27 L. J. Exct., N. S. 209, 4 Jur. N. S. 364, 2 Hurlst & N. S. 728; *Smith v. Baker*, 4 L. R. 16 App. Cas. 353; *Barton's Hill Coal Co. v. McGuire*, 3 Macq. H. L. Cas. 310; *Weems v. Mattheison*, 4 Macq. H. L. Cas. 226.

#### B. OTHER STATEMENTS OF GENERAL RULE.

One of the positive duties of a master is to adopt rules for the protection and safety of his employees, where he is engaged in a complex business which requires definite rules for their protection, and a failure to do so is such negligence as renders him responsible for all injuries resulting therefrom. *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334.

It is the duty of the master, where the business exceeds his personal supervision, to adopt proper rules for the protection of his employees. *Rex v. Pullman's Palace Car Co.*, 2 Marv. (Del.) 337, 43 Atl. 246.

In *Eastwood v. Retsaf Min. Co.*, 34 N. Y. Supp. 198, it is said in the opinion: "The rule is well settled that it is the duty of all persons and corporations having many men in their employ in the same business to make and promulgate rules which, if observed, will afford protection to the employees. This is the more necessary where the manner of doing business is such that the danger or safety of an employee at any given time depends upon the way in which some other employee is engaged at the same time. In such a case, where the action of one employee may make that dangerous which, if he took no action would be safe, it is undoubtedly the duty of the common employer to make such rules as will enable the person whose safety is put at risk to be advised of the danger, and to avoid it. *Abel v. President, etc., Co.*, 103 N. Y. 581, 9 N. E. 325; *Slater v. Jewett*, 85 N. Y. 61; *McGovern v. Railroad Co.*, 123 N. Y. 281, 289, 25 N. E. 373. To be sure, the company is only required to make rules to guard against such accidents and casualties as may reasonably be foreseen, and it is not bound to use more than reasonable care in deciding whether rules are necessary. *Berrigan v. Railroad Co.*, 131 N. Y. 582, 30 N. E. 57. In every case its duty is performed by the exercise of reasonable care in deciding, in the first place, whether rules are necessary, and, in the second place, in making such rules as appear to be sufficient."

In *Foster v. Missouri Pac. Ry. Co. (Mo.)*, 21 S. W. 916, it is said in the opinion: "It is part of his (the master's) personal duty to direct the work he has in hand, and where it is complex (as that of railroad-ing), to provide and enforce reasonable and necessary regulations of the labor engaged therein. Thus the want of a reasonably sufficient 'system' for carrying on a large enterprise (*Smith v. Baker* [1891], App. Cas. 325), or of needful rules for its management (*Regan v. Railway Co.* [1887], 93 Mo. 348, 6 S. W. 371; *Abel v. Canal Co.* [1891], 128 N. Y. 662, 28 N. E. 663) has been held to form a basis for liability where injury to one servant, by the act of his fellow, resulted from such negligent omission of duty by the employer."

In *Ford v. Lake Shore & Michigan So. R. Co. (N. Y.)*, 12 L. R. A. 454, it is said in the opinion: "The master is responsible for his own negligence and want of care, and this may appear from his failure to furnish proper machinery and materials for the work, or from the employment of incompetent and unfit servants and agents, or from a failure to make proper rules or establish a proper method for the conduct of his business. These are the master's duties, and responsibility cannot be evaded by their delegation to agents."

A company is negligent where it fails to adopt a rule or set of rules, thereby impairing the safety of its employees. *Crew v. St. Louis, K. & N. W. P. Co.*, 20 Fed. 87.

In *Chicago & Northwestern Railway Co. v. Taylor*, 60 Ill. 461, 18 Am. Rep. 626, it is said in the opinion: "We concur in much that is said by counsel on this point (different department limitation), but we do not

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think the case turns upon the principle of the cases cited, or is dependent upon it, but rather upon the doctrine affirmed in *Illinois Central R. R. Co. v. Jewell*, Adm'r, 46 Ill. 99; *Schooner Norway v. Jensen*, 52 Id. 373; *Chicago & Northwestern R. R. Co. v. Jackson*, 55 Id. 492; and *Perry v. Ricketts*, Id. 234. The case of *The Chicago & Northwestern R. R. Co. v. Swett*, Adm'r, 45 Id. 197, may also be cited, the ruling idea in all which is, admitting the principle that a common employer is not responsible to a servant for an injury caused by the negligence of his fellow servant engaged in the same line of employment, it is nevertheless the duty of the employer to provide safe structures, competent employees and engines, and all appliances necessary to the safety of the employed, and, as was said in *Chicago, Burlington & Quincy R. R. Co. v. George*, 19 Id. 510, it is their duty to adopt such rules and regulations for running their trains as would ensure safety."

In an action against a railway company for injuries alleged to have been caused by the negligent manner of running the train, it was proper to instruct the jury that the defendant should make and publish sufficient and necessary rules for the government of its employees. *Cooper v. The Central Railroad of Iowa*, 44 Iowa 134.

In *Warn v. New York Cent. & H. R. R. Co.*, 36 N. Y. Supp. 336, it is said in the opinion: "This case was before us on a former appeal, and our decision appears in 80 Hun 71, 29 N. Y. Supp. 897, where we held, viz.: 'The law imposes upon a railroad company the duty to its employees of diligence and care, not only in furnishing proper and reasonably safe appliances and machinery, and skillful and careful coemployees, but also of making and promulgating rules which, if faithfully observed, will give reasonable protection to the employees; and it is also required to exercise such a supervision over its servants and the prosecution of its business as to justify the belief that the business is being conducted in pursuance of such rules. A corporation, in making rules for the government of its employees, is bound to use ordinary care, and to anticipate and guard against such accidents and casualties as may be reasonably foreseen by its managers exercising such ordinary care.'"

In *Baltimore & O. R. Co. v. Camp* (C. C. A.), 65 Fed. 952, it is said in the opinion: "The railway company is bound to provide general rules and general time-tables for the reasonably safe operation of its railway system, and also rules applicable to all emergencies likely to arise."

In *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. 890, it is said in the opinion: "One who employs servants in a complex and dangerous business ought to prescribe rules sufficient for its ordinary and safe management. His failure to do so is a personal negligence, for the consequences of which he is liable to his servants. *Riley v. Baxendale*, 6th Hurst & N. 446; *Vare v. Lancashire R. Comp.*, 2d Herbert P. N. 728; *Sher. & Red. Neg.* 122."

In *Abel v. President, etc., Delaware & H. Canal Co.*, 128 N. Y. 662, 28 N. E. 663, it is said in the opinion: "It is settled doctrine that a railroad company is bound to guard its employees against negligence of coemployees, so far as it can, by the enactment and promulgation of reasonable rules in the management of its business. The rule that the servant takes the risks of the business is subject to the qualification that the master must exercise reasonable care to guard the servant, while engaged in his duties, from unnecessary hazards, including hazards from negligence of coemployees. In the business of a railroad this duty is especially important, in view of the dangers of the employment, and the serious consequences likely to ensue from the negligence of coemployees."

In *Doing v. New York, O. & W. Ry. Co.*, 151 N. Y. 579, 45 N. E. 1028, it is said in the opinion: "The defendant had the power to control and regulate its business. The law imposed upon it the duty of making and enforcing such reasonable rules and regulations for the government of the men in its service as to prevent or guard against injury

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by one servant to another in so far as that was reasonable and practicable."

It is a part of the personal duty of the master to give direction to the work he undertakes, and to prescribe the system or method of conducting it. In so doing, he must use ordinary care for the safety of those engaged in his service. Accordingly, it has been held that the omission to adopt and to enforce rules necessary for the reasonably safe management of a business as complex and as hazardous to life and limb as that here in view may sometimes form the basis for a finding of negligence on the part of the master. *Reagan v. St. Louis, K. & N. W. R. Co.*, 93 Mo. 348, 6 S. W. 371, 12 West. Rep. 367; *Abel v. Delaware & H. Canal Co.*, 128 N. Y. 662, 28 N. E. 663; *Whittaker v. Delaware & H. Canal Co.*, 126 N. Y. 544, 27 N. E. 1042. Such holdings rest upon the same principle that supports the rule of liability for defects in the plant or appliances. As has been tersely said in a case which received very thorough consideration, "A master is no less responsible to his workmen for personal injuries caused by a defective system of using machinery than for injuries caused by a defect in the machinery itself." Lord Watson in *Smith v. Baker* (1891), L. R. 16 App. Cas. 353.

## C. ILLUSTRATIONS OF GENERAL RULE.

## 1. Collisions.

In *Mulvaney v. Brooklyn City R. Co.* (N. Y.), 21 N. Y. Supp. 427, it is said in the opinion: "Then, again, there seem to have been no rules for, and instructions to, those in charge of trains that trains should not pass each other upon this curve at all, or, if they did, that they should slacken the speed, or that all persons must keep off the steps while rounding this curve. A railroad company is bound to guard its employees against the negligence of coemployees, so far as it can, by the enactment and promulgation of reasonable rules in the management of its business. *Abel v. Canal Co.*, 128 N. Y. 662, 28 N. E. 663; *Sheehan v. Railroad Co.*, 91 N. Y. 334. Such a company 'is bound to carry on its business under a proper and reasonable system or regulations; \* \* \* and if, through any defect therein, an injury occurs to the servant, the corporation will be liable.' *Dana v. Railroad Co.*, 92 N. Y. 640; *Ford v. Railway Co.*, 124 N. Y. 493, 26 N. E. 1101. The defendant took no steps to make this track and roadbed reasonably safe and proper, or to instruct the employees of the danger thereof, or to regulate the passing of trains at this dangerous point."

## 2. Moving Cars on Switch Track.

It is the duty of a railway company to establish regulations which would advise its servants moving cars at a station of the duty of care against injuring other employees at work and liable to injury from the movement of cars upon the switch tracks. It should also provide means by which employees on such tracks should be notified of the approach of moving cars. *International & G. N. R. Co. v. Hinzle*, 82 Tex. 623, 18 S. W. 681.

## 3. Hand Cars—Collisions.

In *Wallin v. Eastern Ry. Co. of Minnesota* (Minn.), 21 Am. & Eng. R. Cas., N. S., 611, it is said in the opinion: "The complaint in this action states that appellant operated a railroad in the state of Wisconsin, and engaged a 'bridge gang' at West Superior to operate from that point the repair and reconstruction of bridges along its line. As a part of the consideration of the hiring contract, appellant agreed to daily transport the men to and from West Superior to the station nearest the place of their day's labor by means of its regular trains, and for their transportation from such station to their point of work they were furnished hand cars, to be propelled by themselves. While respondent, who was one of the crew, was riding on a hand car from the place of that day's work to a station where they would board appellant's train back to West Superior, another hand car, propelled by other members of the same gang, overtook the first car, and was negligently propelled against it, derailing it and causing injury to respondent. One of the handles on the front end of the rear car, as it was then approaching,

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was broken off; and, because of its absence, the other handle on the same end of that car caused the preceding car to be pushed laterally and derailed."

"Conceding, then, that respondent and the other men in charge of the hand cars were employees of appellant, and as such engaged in the performance of their duties at the time of the injury, we now consider whether or not the company was required to have in force suitable rules and regulations to govern and control the operation of hand cars under such circumstances. It is well known that the operation of hand cars by men engaged in repairing a railway track is attended with considerable danger. Men frequently go in separate gangs on two cars to some point upon a railroad, and are obliged to run rapidly to avoid passing trains, and accidents are not infrequent as a result of collisions of hand cars thus operated; and it would seem that such business is of so dangerous and hazardous a character that ordinary men who are called upon to take charge of hand cars under such circumstances should be guided by reasonable rules and regulations. In the case of *Steffenson v. Railway Co.*, 45 Minn. 355, 47 N. W. 1068, 11 L. R. A. 271, reference is made to the danger of operating hand cars; and in the case of *Christianson v. Railway Co.*, 67 Minn. 94, 69 N. W. 640, it appears that a rule of that company was in force which required hand cars to be kept apart for a distance of 540 feet. It is true these men were not engaged in the same capacity as section men are, who remain constantly at work along the track for the purpose of repairing it, and are usually in charge of some manager or section boss, but that fact would not lessen the duty of the master to impose rules and regulations for the operation of hand cars. It would, rather, tend to increase that duty; for there would be more necessity of reasonable regulations with respect to inexperienced men for such purposes than where a section crew is operating under the control of a manager. This requirement should not be regarded as a hardship upon a railway company, as it tends to the safety of the public as well as employees, and certainly inures to the protection of the company itself. Our conclusion is that, under such circumstances, it was negligence on the part of appellant to place its employees in charge of such defective car, and permit them to operate it in the manner stated, in absence of reasonable rules and regulations for their guidance."

#### 4. Loading and Unloading Ships.

In *Tully v. New York & Texas S. S. Co.*, 42 N. Y. Supp. 29, it is said in the opinion: "It does not appear that the defendant had, by any rules or regulations whatever, required or directed the agents to advise workmen temporarily employed to work upon the steamships, in loading and unloading, of any precautionary means which it might for their safety be or become desirable to use. For this reason, we think the question whether the defendant was chargeable with negligence was for the jury."

#### 5. Loading Lumber.

In *Ford v. Lake Shore & Michigan So. R. Co.* (N. Y.), 12 L. R. A. 454, it is said in the opinion, "In the case before us it was clearly the duty of the defendant to adopt some system for the loading of lumber upon open cars that would have regard for the safety, not only of its servants and those traveling over its road, but to the safety of all persons who should be in the vicinity of its cars. The importance and extent of the business, and the manifest danger from the falling of heavy sticks of timber from the cars, required this. But there was no rule on the subject. The only rule shown to exist had no particular reference to lumber more than any other freight, and it expressed nothing more than the obligation which the law put upon the corporation, viz., to take due care that freight was safely loaded, and should not fall from the car. But method or system as to loading lumber there was none. Having furnished a good car, and stakes that might be used, the manner of loading lumber was left to the judgment and discretion of its agents and servants. It was not sufficient for the



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defendant to show that its employees knew that the rule I have quoted applied to lumber, and also knew that the general usage required it to be staked, and that stakes were furnished and available to the men in the particular case before us. All this may be assumed to be true, and yet the fact exists that the use of the stakes was not enjoined upon the servant by any rule of the defendant or by any instruction ever given them. Having furnished the car and the stakes, it was left to the judgment and discretion of the foreman whether to use the stakes or not, and in this particular instance they were not used, for the reason that they supposed the lumber would stay on the car over the short distance it was to be carried; and it is because of the failure of the defendant to require the use of the stakes in all cases that the neglect of its servants in this case is imputed to it. There was no rule, and the only method or system was such as the foreman in each particular case should deem the safe and proper one to pursue. Under such a state of facts, the employer must be deemed constructively present during the loading of the cars, and the acts of his agents are in law deemed to be his acts. The improper and negligent loading of the cars is thus traced directly to the defendant, and its negligence established. Thus far I have treated the construction of Rule 82 as a question of law, but in the question submitted to the jury there was opportunity for a finding of fact that the making of that rule was a sufficient performance on the part of defendant of its duties towards its servants, and it is unnecessary to say more upon the exception of the defendant to the submission of that question, as one of the fact to the jury, than that it was a ruling as favorable towards it as the facts of the case warranted. The view of the case herein expressed renders unnecessary any reference to the other findings of the jury which the respondent claims establish the negligence of the defendant."

## 6. Kicking Cars.

In *Regan v. St. Louis, K. & N. W. Ry. Co.*, 93 Mo. 348, 6 S. W. 371, it is said in the opinion: "The duty of the master is stated in *Shear. & R. Neg.* § 93, as follows: 'It is also the duty of the master, so far as he can by the use of ordinary care, to avoid exposing his servants to extraordinary risks, which they could not reasonably anticipate, though he is not bound to guaranty them against risks. One who employs servants in complex and dangerous business ought to prescribe rules sufficient for its orderly and safe management. His failure to do so is a personal neglect, for the consequences of which he is liable to his servants. Thus, a railroad company is bound to regulate the time and manner of running its trains, so as to avoid collision, and to enable all its servants to know when a train may be expected, and thus to avoid danger.' The defendant in error contends that joining of the cars for the purposes and in the manner described in the petition is so common, necessary, and frequent, especially in the case of freight trains, that it cannot be said to involve any extraordinary risk. We do not agree to the proposition. It is certainly a complex business, requiring care, and it must be dangerous if not done under proper regulation; at least, so far as other servants are concerned, whose business requires them to be in and out of the cars liable to be jolted. In these cases of making a flying switch, and of shunting or kicking of cars, it is feasible and perfectly proper to have some rules and regulations to warn persons liable to be injured; and cases are not wanting where railroad companies have been held liable to servants for injuries received in consequence of a want of such regulations for the guidance of the servants in performing these maneuvers. *Vase v. Railway Co.*, 2 Hurl. & N. 728; *Railway Co. v. Taylor*, 69 Ill. 461."

In *Doing v. New York, O. & W. Ry. Co.*, 151 N. Y. 579, 45 N. E. 1028, it was held that, "where a partially loaded car was shunted on the track leading into a railroad repair shop, by employees working in the yard, with such force that it crashed through the closed doors of the shop, and killed an employee working inside, who could not see its approach, and it appeared that the shunting of cars on such tracks towards the shops was a common practice, and the existence of a rule against it was in



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dispute, the question of whether the railroad company was negligent in failing to furnish the deceased a reasonably safe place to work was one for the jury.

#### 7. Protection of Repairers.

Where a car repairer was engaged in work under a car so situated that a jar from an approaching car would cause it to fall and crush him, it is the duty of the company, when apprised that its regulations are insufficient to protect him, to adopt such measures as will afford him reasonable protection against the dangers incident to the performance of his duties. *St. Louis, A. & T. R. Co. v. Triplett*, 48 Am. & Eng. R. Cas. 283, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266.

The court charged that if the foreman ordered the employee to repair the car on the track where it stood, in the absence of any rules on the subject of signals or previous directions to the employee on the subject, if the place could have been made safe by placing a flag at the switch, the failure of the foreman to do so was the failure of the company. But if the employee at the time knew that it was his duty, and that one of the rules of the company required that if he went under the car he must himself place a signal flag at the switch but neglected to do so, and by reason of his neglect he was injured, the company was not liable. It was held that the court correctly stated the law. *Louisville, E. & St. L. C. R. Co. v. Hanning*, 131 Ind. 528, 31 N. E. 187.

It is the duty of a railroad company to establish regulations by which its servants moving cars upon repair tracks may be advised of the position of other employees who may be engaged at work in the repair yards, and who may be injured by the running of the cars so placed upon the tracks; and also to provide means by which those working in the yard may know of the approach of cars upon the tracks in the yard. *International & G. N. R. Co. v. Hall*, 78 Tex. 657, 15 S. W. 108.

Deceased was under a car on a side track used exclusively for storing cars needing repair. He and his fellow workmen had pushed other cars, standing between it and the switch, nearer the switch. It was necessary to move such cars to make such repairs. An engine properly on the lead track struck the car nearest the switch, because it was too near, driving it and the other cars against the one on which deceased was at work, killing him. Defendant had no rules for the protection of repairers at work on such cars. It was held that whether defendant was negligent in failing to have reasonable rules to protect its employees repairing cars on such side track was for the jury. *Cumpston v. Texas & P. Ry. Co.* (Tex. Civ. App.), 33 S. W. 737.

In an action against a railroad company for injuries to a car inspector, caused by moving the car without notice to him while he was under and inspecting it, there was evidence of a rule of the company requiring the use of blue flags and blue lamps on cars under which inspectors were at work, and that defendant did not require it to be followed at the station at which plaintiff was injured: *held*, that it was not error to submit to the jury whether defendant was guilty of negligence in failing to promulgate and enforce such rule, in the event the jury found the rule applicable to the train where the injuries occurred, and whether defendant failed in its performance of the duty it owed to provide for its inspectors such appliances, and a system of transacting its business regulated by a rule that would render their work reasonably safe. *Warn v. New York Cent. & H. R. Co.* (N. Y.), 36 N. Y. Supp. 336.

#### 8. Starting Trains.

A person in charge of a gravel train signaled it to back, which the engineer did, without giving notice or warning, and plaintiff's intestate who was assisting in unloading was thrown down and killed. The plaintiff offered to show negligence on the part of the company in not having adopted a proper system of warning employees before a train was started. It was held that it was error to reject such evidence. *Campbell v. New York, C. & H. R. R. Co.*, 35 Hun (N. Y.) 506.

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**9. Timber Chutes.**

In *Hartvig v. N. P. Lumber Co.*, 19 Ore. 522, 25 Pac. 358, it is said in the opinion: "As it is the duty of the master to furnish a reasonably safe place for his servant to work, it became the duty of the defendant company to provide such reasonable rule or regulation in the conduct of the business as would protect the men while engaged in their work at the foot of the chute. It required the defendant not simply to employ skillful and competent agents and employees in its service, but to adopt rules and regulations adopted to the dangerous nature of the business, so as to guard against accidents; in a word, to be vigilant in the use of means, and in the adoption of measures, to make the servants reasonably safe in their employment. To this extent the master assumes the risks, while the servant assumes the natural and ordinary risks incident to the business in which he is engaged, including those arising from the negligence of his fellow servants. As was said in *Anderson v. Bennett*, 16 Ore. 515, 19 Pac. 765, the duty devolving on the master is affirmative to take such measures, or to adopt such precautionary measures, as the proper and safe conduct of his business requires to avoid accidents. An application of this principle to the defendant requires it to establish some suitable rule or regulation for the prosecution of this business which would render its employees reasonably safe in the discharge of their duties in the course of their employment. It was bound to observance of such care as would not expose them to risks and perils which might be guarded against by proper diligence, or by the promulgation of suitable or needful rules for the safe management of its business. If the defendant had provided some such rule, requiring the men at the head of the chute to give warning before timber was started down the chute, and they should neglect to do it, and an injury should occur to those below, the defendant, having performed its duty, would not be liable, no more than when a master furnishes a safe instrument and competent servant, and, in using it, such servant negligently injures a co-servant."

**10. Working in Salt Bins.**

In an action for the death of plaintiff's intestate when in defendant's employ, it appeared that intestate was sent into a large salt bin to shovel the salt away from the mouth of the chute by which the salt ran into the bin. While intestate was so engaged, salt was drawn off from the bin at the bottom. Soon afterwards plaintiff's dead body came out with the salt. There was evidence that, if any one was in the bin when the salt was running out, and got into the salt above his knees, it was almost impossible for him to get out unassisted. It was held that it was a question for the jury whether defendant was negligent in not promulgating rules to govern persons engaged in shoveling salt in the bin. *Eastwood v. Retsof Min. Co.*, 34 N. Y. Supp. 196.

**II. LIMITATIONS OF AND EXCEPTIONS TO GENERAL RULE.****A. DEGREE OF CARE.****1. Ordinary Care.**

It is the duty of an employer operating a railroad to use ordinary care in so doing, and accordingly to adopt and enforce reasonable rules for the protection of employees engaged in such a service. *Rutledge v. Missouri Pac. Ry. Co.*, 123 Mo. 121, 24 S. W. 1053.

In an action by a car repairer for injuries received while working under a car on the repair track, the court charged that it was defendant's duty to use ordinary care in providing plaintiff a safe place to work; that if it was his duty to go under cars, while on the track, to repair them, it was the duty of defendant to use ordinary care to prevent injury, and if it allowed its employees to move engines on such track without any regulation which could reasonably be supposed sufficient to protect the repairers, and injury resulted thereby, defendant is liable, though the negligence of a fellow servant contributed to the injury, unless plaintiff was guilty of contributory negligence: *held*, proper. *Fordyce v. Briney*, 58 Ark. 206, 24 S. W. 250.

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In *Warn v. New York Cent. & H. R. R. Co.* (N. Y.), 29 N. Y. Supp. 897, it is said in the opinion: "The defendant, in making rules for the government of its employees, is bound to use ordinary care, and to anticipate and guard against such accidents and casualties as may reasonably be foreseen by its managers exercising such ordinary care. *Berrigan v. Railroad Co.*, 131 N. Y. 582, 30 N. E. 57."

A master engaged in a complex business is bound to use ordinary care in directing its management, whether by means of needful rules or through the orders of its managers, foremen, etc. *Foster v. Missouri Pac. Ry. Co.*, 115 Mo. 165, 21 S. W. 916.

**Only Ordinary Care.**

In some of the authorities it is declared that, in making rules for the government of its employees, a railroad corporation is only bound to use ordinary care, and to anticipate and guard against such accidents and casualties as may reasonably be foreseen by its managers exercising such ordinary care; it cannot be assumed that it can by rule guard against and prevent every injury to them.

*Arkansas*.—*Fordyce v. Briney*, 58 Ark. 206, 24 S. W. 250.

*Indiana*.—*Terre Haute & I. R. Co. v. Becker*, 146 Ind. 202, 45 N. E. 96.

*Kansas*.—*Atchison, etc., R. Co. v. Carruthers*, 56 Kan. 309, 43 Pac. 10.

*New York*.—*Berrigan v. New York, etc., R. Co.*, 131 N. Y. 582, 30 N. E. 57; *Warn v. New York C. & H. R. R. Co.*, 80 Hun 71; *Eastwood v. Detroit Min. Co.*, 86 Hun (N. Y.) 92; *Shepherd v. Northern Cent. R. Co.*, 8 Hun (N. Y.) 634 (Sup. Ct. Gen. T.), 18 N. Y. Supp. 665; *Burke v. Syracuse, etc., R. Co.*, 69 Hun (N. Y.) 21; *Morgan v. Hudson River R. Co., etc., Co.*, 133 N. Y. 666, 31 N. E. 234.

*Texas*.—*Houston, etc., R. Co. v. Strycharski*, 6 Tex. Civ. App. 555, 5 S. W. 253; *San Antonio Gas Co. v. Robertson*, 93 Tex. 503, 56 S. W. 23; *Sanner v. Atchison, etc., R. Co.*, 17 Tex. Civ. App. 337, 43 S. W. 33.

*Virginia*.—*Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334.

In *Berrigan v. New York, L. E. & W. R. Co.*, 131 N. Y. 582, 30 N. E. 57, 42 N. Y. S. R. 858, 4 Silv. App. 35, it is held that in making rules for the government of its employees, a railroad corporation is only bound to use ordinary care, and to anticipate and guard against such accidents and casualties as may reasonably be foreseen by its managers exercising such ordinary care; it cannot be assumed that it can by rule guard against and prevent every injury to them.

**Reasonable Care.**

The failure of a master to adopt rules as to precautions to be observed by his employees is not proof of negligence rendering him liable to a servant unless it appears from the nature of the business in which the servant is engaged that the master, in the exercise of reasonable care, should have foreseen the necessity of such precautions. *Morgan v. Hudson River O. & I. Co.*, 133 N. Y. 666, 31 N. E. 234, 45 N. Y. S. R. 12, 4 Silv. App. 266.

**Reasonable Protection.**

It is the duty of a railroad company to make such regulations or provisions for the safety of its employees as will afford them reasonable protection against the dangers incident to the performance of their respective duties. *The Lake Shore & Michigan Southern Ry. Co. v. Peter Lavalley*, 36 Ohio 221, 5 Am. & Eng. R. Cas. 549.

It is the duty of a railroad company to frame and promulgate such rules and schedules for the moving of its trains as will afford reasonable safety to the operatives engaged in moving them. *Lewis v. Seifert*, 16 Pa. St. 628, 11 Atl. 514.

**So Far as Practicable.**

As between employees of a railroad company, whose duty it is to repair its track while trains are using the same, and the company and its representatives, who are engaged in running trains over the same where the trackmen are so employed, it is the duty of the latter, as far as is practicable, to adopt such precautions as will guard its employees



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on the track from dangers incident to their employment. *Dick v. Road Company*, 38 Ohio St. Rep. 389.

### 6. High Degree of Care to Avoid Collisions.

It has been held that the law holds railroad companies to a degree of care and diligence in the adoption and enforcement of needful rules and regulations to avoid collisions of trains, and an employee is injured by reason of a failure to adopt such rules the company is liable. *Chicago & A. R. Co. v. McDonald*, 21 Ill. App. 409.

### B. PRACTICE IN FORCE SUFFICIENT.

In *Kudik v. Lehigh Val. R. Co.*, 78 Hun 492, 29 N. Y. Supp. 5 was held, that the failure of a master to make rules is not negligent where the practice actually in force renders a rule unnecessary.

A railway company is not liable to an employee for injuries sustained by him on the ground of its failure to make regulations which might have prevented the accident causing such injuries, where the accident was occasioned by circumstances which could not have been reasonably anticipated, and where a compliance with the general body of rules and the exercise of ordinary care and prudence by the employee would have avoided it. *Berrigan v. New York, L. E. & W. R. Co.*, 131 N. Y. S. 2d 57.

The proximate cause of injury to plaintiff while under a car repairing it on the repair track, occasioned by the backing in of a car without notice to him, is the negligence of a fellow servant, and not the failure of suitable rules; the custom in force, known by plaintiff, of protecting car repairers by the switchman or switch engineer giving warning, being a sufficient regulation, if observed. *Campbell v. Texas & P. Co.*, 16 Tex. Civ. App. 665, 39 S. W. 1105.

### 1. Moving Detached Cars in Yards.

In the entire absence of testimony tending to show that any other rules or system of signals for the giving of notice or warning of the approach of detached cars in railroad yards would be feasible or useful, a jury is not justified in finding that a railroad company is negligent for failing to prescribe the same. *Atchison, T. & S. F. R. Co. v. Carriers*, 56 Kan. 309, 43 Pac. 230.

### 2. Railroad Yards—Lookouts.

Where an employee, whose duty it was to turn switches, couple and give signals, was run over and injured by the backing of a train on the private grounds of the company, while he was engaged in his duty, it was held that the company was not guilty of negligence nor liable to the servant in not providing rules whereby a watchman should have been kept on the rear end of the train that produced the injury, without proof showing there was a watch or lookout kept from the engine. *Chicago & N. W. P. Co. v. Donahue*, 75 Ill. 106.

### 3. Use of Conductors' Valves.

Care due trainmen does not require a railroad company to print instructions instructing the conductor and brakeman on passenger trains as to the use of conductor's valves placed in each car, which enable such trainmen, by pulling a cord, to set the air brakes. It is sufficient if the trainmen are orally instructed. *Whalen v. Michigan Cent. R. Co.*, 114 Mich. 51, 75 N. W. 323.

### 4. Wild Trains.

In *Terre Haute & I. R. Co. v. Becker*, 146 Ind. 202, 45 N. E. 9 was held that in case of death of an employee on a regular train, running on time, caused by collision with a train "working wild," the company is not negligent in failing to notify the regular train of the presence of a wild train, or to have a rule requiring such notice; all trainmen being furnished with time cards of regular trains, on which is a rule requiring wild trains to keep out of the way, and off the time, of regular trains.

### C. DANGER OBVIOUS OR BUSINESS NOT COMPLEX.

Failure of a railroad company to enact rules for simple duties, where the danger attending the discharge of which is obvious, does not constitute

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negligence, unless, from nature of the work in which the employees were engaged, the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity for such rules. *Norfolk & W. Ry. Co. v. Graham*, 96 Va. 430, 31 S. E. 604.

A master is not compelled to furnish employees with printed rules for their government, guidance, and safety, when the nature of an employment makes it dangerous, and the dangers incident thereto and growing out of it are of common knowledge, are fully known to and understood by the servant, and the safety of others cannot be imperiled by any act of omission of his in the performance of his duties, and his safety depends wholly upon the degree of skill, care, and caution used by himself. *Fritz v. Salt Lake & O. Gas & Electric Light Co. (Utah)*, 56 Pac. 90.

In *Wallin v. Eastern Ry. Co.*, 83 Minn. 149, 86 N. W. 76, it is said in the dissenting opinion of Brown, J.: "I do not understand that the rule of law requiring the adoption of regulations for the conduct of a complicated business is intended to protect workmen from their own negligence. Such regulations and rules are required solely for the purpose of enabling the employees to understand and comprehend the operation and management of instrumentalities and services of a complex nature which may result in injury to them if not understood, and not to guard or protect them from their own negligent misconduct, nor shield them from dangers and risks which are apparent and obvious to a person of ordinary intelligence. *Morgan v. Iron Co.*, 133 N. Y. 666, 31 N. E. 234; *Railroad Co. v. Voss*, 12 Am. & Eng. R. Cas., N. S., 820; *Berrigan v. Railroad Co. (N. Y. App.)*, 30 N. E. 57, 131 N. Y. 582.

In *Morgan v. Hudson River Ore & Iron Co.*, 133 N. Y. 666, 31 N. E. 234, it is said in the opinion: "The cases in which the master, by omitting to provide proper rules, subjects himself to the imputation of negligence are thus stated in a work of authority: 'If a master is engaged in a complex business that requires definite regulations for the safety and protection of his employees, a failure to adopt proper rules, as well as laxity in their enforcement, is negligence per se, and the establishment of defective or improper rules is such negligence as renders the master responsible for all injuries resulting therefrom.' *Wood, Mast. & Serv.* p. 794, § 403. Within the principle here stated, and upon the authority of several recent cases, the court was not warranted in submitting the case to the jury. *Berrigan v. Railroad Co.*, 131 N. Y. 582, 30 N. E. 57; *Corcoran v. Railroad Co.*, 126 N. Y. 673, 27 N. E. 1022; *Larow v. Railroad Co. (Sup.)*, 15 N. Y. Supp. 384."

In *Huston & Y. C. Ry. Co. v. Strycharski*, 6 Tex. Civ. App. 555, 26 S. W. 253, it is said in the opinion: "It is certainly the duty of railway companies to have suitable regulations for the doing of their business, which will give reasonable protection to their employees, where the exposure is such that prudence requires it. But all risks which an employee incurs in the service cannot be so provided against by previous regulation. There are some from which, by the use of his senses, he must protect himself. Such are those which are open and patent to his observation."

#### 1. Backing Cars at Water Tank.

Where a railroad employee, while engaged in filling the water tank of a train, for that purpose standing on a ladder, which leaned against the car, and holding the water pipe, is injured by the backing of cars against the train, after the cutting out of a car, he cannot hold the company liable on the theory that there should have been, and he had a right to believe that there was, a rule requiring a warning to be given him before the cars were so backed to be coupled, though, during the week he had been so engaged, warning had been given him; he having knowledge that always, during the 20 minutes the train was at the station, not only was the tank filled, but a car was cut out and the other cars recoupled, and he being in a position and so engaged as to be able to see the cars when coming back. *Houston & T. C. Ry. Co. v. Strycharski*, 6 Tex. Civ. App. 555, 26 S. W. 253.



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**2. Cars Obstructing Crossing.**

Plaintiff's intestate was engaged in making up trains, and was riding on the front step of a yard engine, was killed by colliding with a wagon at a highway crossing, used by the company in hauling material to its repair shops. Six tracks were laid over the crossing, five of which were used for storing cars, and the intestate was charged with the duty of cutting them apart, so as to leave the crossing open. The negligence charged against the company, was leaving cars on these tracks, so that the intestate could not see an approaching wagon, and that the company should have established a rule requiring the cars to be run back a certain distance from the crossing. There was no expert evidence showing that such a rule was necessary and proper. It was held that a nonsuit was properly allowed. *Hebert v. Delaware & H. Canal Co.*, 16 N. Y. Supp. 561.

**3. Collision at Lime Kiln.**

In an action by a servant against his master for personal injury, it appeared that defendant operated a series of ore kilns, which stood on an incline, one above the other. On the incline in front of the kilns was a railway, on which were cars to carry the ore. In loading these, ore sometimes fell on the track, and had to be removed, and for this purpose men were provided. At the time of the accident plaintiff was removing ore from the track under a car, and, after removing a portion with a crowbar, crawled under the car to remove the rest with his hands. While so doing a car above, started by some cause unknown, pushed the car under which plaintiff was working, causing the injury in question. It was held that there was nothing in the nature of the work rendering it necessary for the defendant to make rules for its employees to prevent such an accident. *Morgan v. Hudson River Ore & Iron Co.*, 133 N. Y. 666, 31 N. E. 739.

**4. Loading Cars.**

A railroad company is not negligent in failing to prescribe rules for loading iron rails on a flat car, in order to protect the workmen engaged therein, where there is no evidence that any rule relating to such loading had been adopted by other companies, or was necessary or practicable. *Ely v. New York Cent. & H. R. R. Co.*, 88 Hun 323, 34 N. Y. 873.

**5. Moving Cars on Siding.**

In the case at bar the work was neither complex, nor difficult. The occasional moving of cars by hand on a railroad siding is not a work of such nature as to require the promulgation of rules for the government of servants engaged in such moving. *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334.

**6. Operation of Freight Yards.**

A railroad company, in the operation of its railroad and freight yards, is not bound to make, establish, and enforce rules and regulations to protect its servants and employees from the risk of danger incident to the employment, or from those risks which are obvious to the common employment, nor from the risk of danger to be incurred by reason of the want of ordinary care on the part of the servant in the employment. *Delaware, L. & W. R. Co. v. Voss* (N. J.), 12 Am. & Eng. R. Cas., N. S., 820.

In this case it is said in the opinion: "But the count of the declaration obtains its force from the further averment of negligence of the defendant in operating its roads, which is couched in these words: 'and of its negligence and carelessness in failing to make and enforce reasonable and proper rules and regulations for the guidance of its employee in the operation of its said yard,' and again charged it with 'negligence and carelessness in failing to make and enforce reasonable and proper rules and regulations for the guidance of its employees in its said business.' The declaration further avers that cars were permitted or suffered to be drawn with great violence at the yard, and against the car from which the plaintiff was obtaining coal, thereby causing him to be thrown from the car, and sustain

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injury. There is no averment whatever setting forth in what respect the failure to make reasonable rules and proper regulations was the cause of the injury to the plaintiff. Even if such averment had been contained in this count of the declaration, still it is clear that in the work of the operation of this yard, and the business carried on therein, the plaintiff assumed all the risks of the negligence of his co-servants, as incidental to this class of employment, and therefore the gravamen of the count in so far as the liability of the defendant is concerned, is in the averment that the company failed to establish certain general rules for the guidance of its employees or servants in their relation to each other in the work being carried on in this yard. This count of the declaration is framed upon the general idea that it was the duty of the defendant, as master, to make and enforce rules and regulations for the operation of its yard. I think it is sufficient to say that in the law no such legal duty existed upon the part of the defendant. Risks which are incidental to the employment, risks which are obvious, and those arising from the negligence or co-servants, and those created by the want of reasonable care in the exercise by the servant of his employment, are all assumed by the servant when he enters or continues in the service; and there cannot, in reason, be any legal duty resting upon the master to establish rules and regulations to protect the servant from such risks. The general averment of the failure to exercise reasonable care to make and establish or enforce rules and regulations furnishes no basis of liability against the master. No authorities have been cited to sustain such a proposition, and it cannot be founded upon any sound reasoning. The cases to which reference has been made in support of this count are cases in which is declared the duty of the master to exercise the legal degree of care to provide a safe place for the servant to do his work, or provide safe appliances with which to perform it, and that the master is answerable for default in these respects, and that the default may exist in the system provided for the servant to work by, or in the particular method by which the work is done, and can have no application whatever to the case in hand. There is a class of cases which hold that, if rules and regulations are made, they must be of such a character as will afford reasonable protection from incidental or obvious dangers, and if they are unreasonable, and obedience to them causes injury to the servant, a liability arises upon the part of the master; but there is no principle of law compelling the establishment of rules by which the work of the master shall be done by the servant. The great danger to the master would be the establishment of rules and regulations for the conduct of his business, the operation of which might result in risks not contemplated by the parties, and involve serious discussion as to their reasonableness. The master is not bound to make any such rules, but is entitled to have his liability to his servant for the dangers of the work determined by the application of the general principles of law regulating and governing the relation of master and servant to each particular cause or case of injury as it arises, and to the system or manner in which his business is operated or conducted. Neither do the cases in which the question of the duty of the master towards an ignorant or inexperienced workman entering upon a dangerous employment is discussed have any place in the determination of the questions presented by this count."

#### 7. Taking Ties from Pile.

A railroad company, having creosote works for the treatment of ties, had the ties brought in on one track, and piled between it and another, by which they were taken to the works. It was held that the business was not of such a nature as to require the company to prescribe rules for those taking away the ties to leave the remnant of a pile in such condition that it would not fall on other employees unloading other ties. *Texas & N. O. Ry. Co. v. Echols*, 87 Tex. 339, 27 S. W. 60.

#### 8. Sawyers.

A sawmill owner cannot be charged with negligence for failing to direct one employed as sawyer by special rules to observe care towards

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an off-bearer engaged in certain work with him, and injured by his negligence, where the work was not complex, and there was no evidence that it was customary in sawmills to direct employees by special rules. *Olsen v. North Pac. Lumber Co.* (C. C. A.), 100 Fed. 384.

**D. PRACTICE OF OTHER RAILROADS.****May Be Considered**

When the question is whether the case was one in which rules ought to have been made, the fact that others engaged in the same business have or have not found it necessary to make rules upon the subject may be considered. *Morgan v. Iron Co.*, 133 N. Y. 666, 31 N. E. 234; *Eastwood v. Retsof Min. Co.*, 86 Hun (N. Y.) 91; *Abel v. Delaware, etc., C. Co.*, 128 N. Y. 662, 28 N. E. 663; *Ely v. New York Cent. & H. R. R. Co.*, 88 Hun 323, 34 N. Y. Supp. 739; *Whalen v. Mich. Cent. R. Co.*, 114 Mich. 512, 72 N. W. 323; *Larow v. New York, L. E. & W. R. Co.*, 15 N. Y. Supp. 384; *Berrigan v. Railroad Co.*, 14 N. Y. Supp. 26.

**1. Absence of Evidence as to Practice of Other Companies.**

In an action against a railroad company for negligently causing the death of an employee it appeared that while decedent was coupling in making up a train in defendant's yard a switch engine pushed some cars down on the rear of the train which was being made up, causing the train to move suddenly forward 10 or 15 car lengths, and decedent was between two cars making a coupling. No signal was given of the approach of the switch engine on the same track. It was held that it was error to charge that the jury might determine whether it was reasonable "to require the railroad company to promulgate a rule forbidding entrance on a switch when another engine and train is in the yard," unless a signal is given or notice is sent to the employees of the train," and that, if they found such a rule to be reasonable, they might find defendant negligent; it not appearing that any railroad company had such a rule, or what its practical effect would be if adopted. *Larow v. New York, L. E. & W. R. Co.*, 15 N. Y. Supp. 384.

In *Ely v. New York Cent. & H. R. R. Co.*, 88 Hun 323, 34 N. Y. Supp. 739, it is said in the opinion: "In this case there was no evidence of any rule relating to the work in which the plaintiff was engaged had been adopted by other companies engaged in business of a similar character, or by experts or other witnesses to show that any rule was necessary or practicable in such a case, or was the evidence such as to make the necessity and propriety of making and promulgating any rule so obvious as to render the question one of common experience and knowledge. Under similar circumstances, it was held by this court in *Doin v. Railroad Co.*, 73 Hun 270, 26 N. Y. Supp. 405, that the evidence was sufficient to justify the court in submitting to the jury the question of the defendant's negligence upon that ground. The same doctrine is applied in *Berrigan v. Railroad Co.*, 131 N. Y. 582, 30 N. E. 57, and *Morgan v. Iron Co.*, 133 N. Y. 666, 31 N. E. 234."

Defendant's printed rules were adopted by men skilled in railroad work and after years of experience. Plaintiff's train and the one against which it were specials, being run to the Columbian Exposition. Plaintiff's train for several months been running special trains, under the system of rules in force when the accident occurred, to and from such Expositions, and no accident had previously occurred. The cause of the accident was unknown. There was no evidence that any other railroad company adopted more effective regulations. It was held error to permit the jury to find culpable negligence on the theory that defendant might have avoided the accident by the adoption of other rules. *Whalen v. Michigan Cent. R. Co.*, 114 Mich. 512, 72 N. W. 323.

**But Not Conclusive.**

In *Eastwood v. Retsof Min. Co.*, 34 N. Y. Supp. 196, it is said in the opinion: "When the question is whether the case was one in which rules ought to have been made, the fact that other people or corporations engaged in the same business had or had not found it necessary to make rules upon that subject, is one which might well be considered. But the fact that no such rules had been made is not conclusive against



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the necessity of making them. It is simply a fact to be considered. Where the business is complicated, the circumstances are those which do not occur often, and the danger is not serious, it may well be that the fact that other people engaged in the same business have found no necessity for making rules for the particular case may be almost conclusive that such rules are not necessary. But where the circumstances are such that any person can see what might happen in a given case, and the danger is plain and obvious, the jurors might be at liberty to infer that rules to protect the employee were necessary, although they had no experience in the particular business, and although there was evidence that other corporations in the same business had made rules for such cases. *Morgan v. Iron Co.*, 133 N. Y. 666, 31 N. E. 234." A. R. Y.

## BOYER v. EASTERN RY. CO. OF MINNESOTA.

(*Supreme Court of Minnesota, Nov. 14, 1902.*)

[92 N. W. Rep. 326.]

## Hazardous Employment—Duty to Make Rules.\*

The ordinary labor of unloading logs from flat cars is not attended with extra hazards or involved in such complicated and obscure conditions as to require, by the corporation engaged therein, the formulation of rules for the conduct of the business of its employees.

## Assumption of Risk.

Where a servant is ordered, with other employees, to unload logs from flat cars, where the risk arising from the incidental performance of the work is open and apparent to observation he assumes the dangers caused by the negligence of fellow servants.

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Allegations of the complaint in this case considered, and held, that the work described therein was of a usual and customary character, and the dangers thereof open to observation, and that an injury resulting from the performance of the work by a fellow servant was incident to the common employment and remedies.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; C. B. Elliott, Judge.

Action by Peter Boyer against the Eastern Railway Company of Minnesota. From an order overruling a demurrer, defendant appeals. Reversed.

W. E. Dodge, Rome G. Brown and Charles S. Albert, for appellant.

Frank D. Larrabee, for respondent.

LOVELY, J. Appeal from an order overruling a demurrer. The material facts in the complaint may be summarized as follows: Plaintiff, a bridge carpenter, was employed to work at defendant's yards at Superior, Wis. Flat cars loaded with poles were placed upon a side track to be unloaded. These cars were 38 feet in length, while the poles placed thereon were 70 feet long, each being two feet in diameter at the larger, and 8 inches, at the smaller, end. The poles were placed upon the floor of the cars lengthwise; five of each

\*See notes to preceding case.

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being laid side by side, in four tiers, with crosspieces between the tiers, two poles being laid on top, making the fifth tier. The poles were held in place by stakes fastened by the braces on each side of the cars, extending above the top of the poles. At the time of the injury, plaintiff was ordered from his work as bridge carpenter, to assist in unloading the cars. In this work he had no experience, the details were unknown to him, and he was under the direction of a general foreman, who had the right to discharge him and to give orders as to how he should perform his work. Under the instructions of the foreman and others, a skidway was constructed from the floor of the car to another skidway nearer the ground. The stakes on one side of the car were taken out, and the logs were rolled off the cars, by plaintiff and others, down the skidways. It is alleged that the only proper way to have loaded the logs was to have sawed off stakes as each layer of logs was to be removed, and to roll off each tier consecutively, but that defendant negligently, through its foreman, removed the logs from the side of the car after the stakes were displaced so as to permit the logs to spread when one of them which was very crooked in the middle slipped into a space, making the spreading of the logs, and swung around, knocking plaintiff from the car.

It is specifically alleged that defendant failed to provide proper rules and regulations for the conduct of the work, for plaintiff's benefit. Upon this complaint, we are not authorized to inquire into any peculiar statute of Wisconsin involving the duties of master and servant. It was not pleaded, and doubtfully could not be considered. *Myers v. Railway Co.*, 69 Minn. 476, 72 N. W. 694, 65 Am. St. Rep. 579. Here the liability arises upon the common-law obligation of master and servant, as is conceded by plaintiff, and the case is similar to one where a foreman, with other servants, engaged in a common employment with plaintiff, and by the alleged negligent manner of their performance of the work occasioned injury to him. In this respect he must be held to have assumed the risk under the principle announced in *O'Neil v. Railway Co.*, 80 Minn. 27, 82 N. W. 1086, 51 L. R. A. 511, unless the allegation with reference to the inexperience of the plaintiff and the failure to furnish proper rules distinguishes it from the established rule recognized in that case; and it does not appear to the court that it does. It is alleged in the complaint that there was a proper method of doing the work. This, so far as such allegation goes, is nothing more than the opinion of the pleader; as there is no further statement that the sawing off of the stakes is a usual and customary method of unloading logs from cars in the railroad service, and we cannot assume it to be so. The allegation that the hazards of this service were unknown to plaintiff, even though he was inexperienced, is not sufficient, when the nature of the business itself is considered, to require the establishment of rules.



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and regulations, or so obscure as to demand specific warnings of the danger; for it is only where the business is complicated, as well as dangerous, that it is the absolute duty of the master to provide rules (Vogt v. Honstain, 81 Minn. 174, 83 N. W. 533; Reberk v. Horn & Danz Co., 85 Minn. 326, 88 N. W. 1003), or not observable, that notice of danger is required (Gray v. Commutator Co., 85 Minn. 463, 89 N. W. 322).

But in this case the work was of the most ordinary character, where, from the description of the manner of performing it as set out in the complaint, the dangers incurred thereby were patent and open to observation, requiring no peculiar skill; and it has never been required that rules and regulations for the conduct of the business should be provided in such cases. Such hazards between the master and servant are necessarily assumed, and where an injury arises the master cannot be held liable therefor unless he is made an insurer, and responsible for every accident that occurs to his employees.

Order reversed.

#### ILLINOIS CENTRAL R. R. CO. v. MAUD H. CLARKSON.\*

(*Supreme Court of Tennessee, April Term, 1899.*)

##### Accident at Crossing—Statutory Precautions—Switch Yards.

Where an accident occurs in switching operations proper and necessary, in and about depot grounds and yards, whether on, across, or off a street, the railroad company cannot be held liable merely on the ground that the statutory precautions required to be observed when trains are being run along or across streets were not complied with, as such statutory provisions do not apply to switch yards.

##### Death by Wrongful Act—Switch Yards.†

Under the laws of Tennessee, in an action for wrongful death of a husband and father, recovery may be had for the mental and physical suffering of the deceased, his loss of time, and any necessary expense shown to have been incurred, and also damages resulting to the parties for whose use and benefit the suit was brought, that is the pecuniary loss sustained by the widow and child in the deprivation of the support in care of both, and the education of the latter.

Messrs. Francis Fentriss and T. E. Cooper for appellants.

Messrs. Wright and Wright for appellee.

SNODGRASS, C. J. This is a suit by Maude H. Clarkson for damages for the killing of her husband, C. C. Clarkson, by the Illinois Central Railroad Company, in Memphis.

She sues as administratrix, for the use of herself, as widow, and two minor children.

There were verdict and judgment for \$12,000, and the defendant appealed and assigned errors.

Many errors are assigned, only three of which it is necessary to notice.

They are, first: That the court charged "the injury having

\*This case has never been published in the Tennessee Reports.

†See foot-note appended to Ft. Worth & R. G. Ry. Co. v. Sivells (Tex. Civ. App.), 3 R. R. R. 927, 26 Am. & Eng. R. Cas., N. S., 927.

occurred on a track in the street," the statutory precaution applied. As the engine was running backward, of course the charge was correct, there could be no defense, except to mitigate damages.

The facts were there were two tracks running across Calhoun street, the main track and a sidetrack leading over to an engine house and a switch track by the compress. This had been for a considerable time used for switching purposes by the company, according to the testimony of two witnesses. It was being so used on the present occasion.

An engine had crossed the street on this track, taken the switch and was being backed across the street on the main track, to the yards of the company, on the south side of Calhoun street.

On this state of facts the company had the right to the benefit of its evidence, that this was a part of its switching arrangements, and that it was legitimately engaged in switching operations, and it was error not to charge that if such were the facts, the statutory precautions did not apply.

It has always been held that statutory precautions must be observed where applicable, or railroad companies will be liable for some damages, however great the negligence of the injured person, unless he wilfully causes the injury to be inflicted. 6 Cold. 45, R. Co. vs. Burke; 6 Heis. 174, R. Co. vs. Smith; 4 Pickle 672, R. Co. vs. Foster.

In like manner, it has been held that the precautions must be taken in the proper way and with machinery in the proper condition and position to observe them, and with vigilant and properly placed watchful lookout. 6 Heis. 174, R. Co. vs. Smith; 5 Lea 450, R. Co. vs. White; 6 Pickle 271, R. Co. vs. Wilson.

It has been also settled that the statutory precautions must be observed while trains are running along the streets of a city. 6 Pickle 235, Katzenberger vs. Lawo; 6 Pickle 271, R. Co. vs. Wilson.

And likewise that liability results absolutely if such trains were being run backward with no headlight or lookout in front. 6 Pickle 271, R. Co. vs. Wilson; 8 Pickle 26, R. Co. vs. Acuff; 14 Pickle 655, R. Co. vs. Dies.

This is the rule. But the exceptions to it are equally well settled. They are, so far as need be stated, that the statutory precautions need not be observed as to employees or strangers in its yards or depot grounds. 9 Heis. 276, R. Co. vs. Robertson; 2 Baxter 385, R. Co. vs. Conner.

The last case was decided in 1872. It reserved the question as to "strangers," which was affirmatively decided against the liability in 1875. Cox vs. R. Co., 2 Legal Reporter 100.

This case and the principles announced in it and those preceding have ever since been followed.

So it has become settled law that the statutory precautions

do not apply to moving cars detached by breaking, nor when the employees of a railway company are engaged in the distribution of detached cars, in the making up of trains, and in other necessary switching in and about its yards, depot grounds and side tracks, nor while engaged in switching operations about the depots and yard of the railroad, even though across streets. 7 Baxter 239, Haly vs. R. Co; 15 Lea 150, R. Co. vs. Rush; 11 Pickle 419, R. Co. vs. Pugh; R. R. Co. vs. Tucker, Shelby Law Docket, Jackson 1896.

It seems to be assumed in the argument that the Wilson case and the Dies case announce a different doctrine on this question. It is true that in both those cases the train was being pushed backwards in a street, but it is shown in both that the rule applied was the general one, and not the exception.

In the Wilson case a train was being regularly run by pushing north of Market street, where the injury occurred.

It was making its way to the yards south of Market street. (6 Pickle 272.)

No question was made as to its being in the yard or engaged in switching operations.

The same is true of the Dies case. On page 657 (14 Pickle) the Judge delivering the opinion says: "This point was not in the yards of the company and the engine and tender were not engaged in switching, etc."

In neither case was there any intention to charge the exception to the rule as to switching, but to maintain it, by the implications plainly apparent in the quotations from both cases.

Dealing, however, only with the rule in these cases, there was no call for elaborating or enumerating exceptions. Enough only was stated to show that the rule adhered to was not in disregard of its well recognized exceptions. In other words, whenever the statutory precautions apply they must be observed—not that they must be observed where and when they do not apply.

The error in the charge of the court, in respect to observance of the statutory precautions, occurred both in the original charge and in refusal of defendants' request as to the engine being at the time engaged in switching operations.

The court charged unconditionally that the statutory precautions did apply. And upon request of defendant to charge that they did not apply in the yards of the company and to its switching operations, the court gave this, but added:

"But the court must say to you, gentlemen, that the public streets of the city of Memphis cannot be used as a switch yard by any railroad without the exercise of care and precaution to protect the public against injury from such service as that; that is, they must observe the statutory requirements."

Then ensued orally before and by the court the following:

Counsel for the Company: "That is, Your Honor, that in addition?"

The Court: "Yes, sir."

Counsel for plaintiff: "The Supreme Court has repeatedly held that a public street of that city could not be used as a switch yard."

The Court: "I charge that. He says 'in the switch yard first, and then I charge them that they cannot use the streets of a city as a switch yard.'"

Counsel for Plaintiff: "If Your Honor please, I was only to suggest that perhaps Your Honor's suggestion was too broad there. Of course, a railroad may switch across a public street but in doing so it must use statutory precautions."

The Court: "Read that; you will see that I have got it right way; whenever it uses a public street, it must use statutory precautions."

Counsel for Plaintiff: "And that is all of it."

In all this as we have seen there was error.

If the accident occurs in switching operations proper precautions necessary in and about the depot grounds and yards whether on or off a street, the company is not required to observe statutory precautions, though it is required to observe the care and caution which the dangerous conditions demand.

It is always, therefore, a proper matter of fact under proper instructions, for the jury to determine whether switching was being in fact done, and lawfully done, although upon a street. There is no decision of this Court in regard to switching operations not being within the exception of the rule as to statutory precautions, if done upon a public street.

Whatever may be the rights of the city authorities as to the public to allow or forbid such use, when it is in fact allowed and done, we are aware of no rule of law or case settling this Court, holding that such switching is not within the exception suggested.

The Tucker case, heretofore cited, is on the affirmative of other cases, so far as they go, in accord.

Objection was made to the court allowing the oral suggestion and amendments of counsel. But while this practice is not a correct one and would occasion reversal if it appeared to have worked an injury or probable injury in a particular case, yet in this case both parties participated, and best appears, that, after all, the suggestions seemed to be adopted in the charge went no further than the court had already said in the proposition announced by himself, though the court emphasized it very strongly.

On the question of the measure of damages, the court charged: "The party suing shall, if entitled to damages, have the right to recover on the following elements of damages: Mental and physical suffering, loss of time, also pecuniary damages resulting to the parties for whose use and benefit the suit is brought. Also the life expectancy or

of time her husband expected to live. All these elements enter into and constitute the damages sustained in a personal injury suit."

This was error. In the first place, it is doubtful as to its meaning, if only applied to the recovery, which plaintiff might have made for deceased's loss.

It means most naturally, in respect to a life expectancy, that plaintiff might recover it on exact estimate. This is error. (R. Co. vs. Spence, 8 Pickle 173.)

The damages given by the Act of 1883, where death results, are, to the party suing, if entitled to recover, for the mental and physical suffering, loss of time and necessary expenses resulting to the deceased from the personal injuries. And also the damages resulting to the parties for whose use and benefit the right of action survives.

These are to be given to the latter only for their pecuniary loss. 15 Pickle 500, R. Co. vs. Wyrick.

By the use of the word "duplicating" in that case it was not stated or intended to be meant that there should be in all respects a duplication, for the case itself was decided upon the theory that these parties were not to have considered and allowed to them the same measure as the other. In the claim of parties in that case their mental suffering and grief were asserted. This claim was rejected and it was held that only their pecuniary loss, whatever it was, was allowable. It is obvious that this might be very differently fixed according to the parties entitled might have sustained loss, and as to its amount in view of their relation to deceased or dependence upon him and his condition and in view of all the circumstances in each particular case. It would not be possible to duplicate even the elements which go to make up any loss which any parties might be intitled to, unless indeed between parties similarly related and situated, and upon precisely like condition of facts in any two cases.

In view of the statute and decided cases a correct charge on this point would have been:

"The plaintiff, if entitled to recover at all, is entitled to recover damages for mental and physical suffering of the deceased, his loss of time and any necessary expense shown to have been incurred, and also entitled to recover the damages resulting to the parties for whose use and benefit the suit was brought, that is the financial pecuniary loss sustained by the widow and child in the deprivation of the support and care of both and the education of the latter.

"All these things are to be considered in estimating the damages as a whole, but there is no exact method of calculation known to the law, by which you can definitely say what either should be. You take them all into consideration in forming a just and reasonable estimation of the damages sustained, if any."

We do not say that this is all that could or should be said



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in this connection, but it embodies substantially, the calculation of damages allowed by the Act of 1883, and indicates the basis of estimation upon which a proper allowance should be rested.

There is another objection on account of the misconduct of the jury and other assignments of error which need not be noticed, as the case must be reserved for the reason stated in other assignments.

## LA POINTE v. BOSTON &amp; M. R. R.

(*Supreme Judicial Court of Massachusetts, Hampshire, Oct. 31,*

[65 N. E. Rep. 44.]

**Carriers—Injuries to Passengers—Alighting from Moving Train—Contributory Negligence.\***

Plaintiff started to alight from a train on arriving at her station but was delayed by a bundle that she carried, and had not gotten to the platform until after the brakeman had returned into the car and sat down. She went upon the platform and fell off the car steps as the train had started. She wore a veil, but testified that this did not hinder her seeing well; and the evidence as to how far the train had gone after starting was conflicting, varying from 40 to 60 feet, the plaintiff was picked up at a point 82 feet south of the platform at the station, and it was not disputed that she took no means of observing whether the train had started until she was on the next to the last step of the car: *held*, that plaintiff was guilty of contributory negligence as a matter of law.

Exceptions from supreme judicial court, Hampshire county.

Action by Ursula La Pointe against the Boston & Maine Railroad. From a judgment in favor of defendant, plaintiff brings exceptions. Exceptions overruled.

John C. Hammond and Henry P. Field, for plaintiff.  
Wm. G. Bassett, for defendant.

LATHROP, J. While the evidence in this case differs in some respects from that which was before us a year ago (*N. E. 142*), yet we are of opinion that the judge was right in directing a verdict for the defendant. One point relied upon to show a difference in the evidence is that, while the plaintiff testified at the first trial that she had admitted that her veil hindered her from seeing quickly enough that the train was really moving, she could not remember at the second trial that she had made such an admission, and further testified that her veil did not hinder her from seeing well. Another point relied upon is that the evidence at the second trial was contradictory as to the place where the plaintiff fell, and it is argued that there was evidence from which the jury could draw the inference that the plaintiff was on the next to the last step of the car when the train started. It is true that the locomotive engineer, who at the first trial testified

\*See generally, foot-note appended to *Pittsburgh, etc., Ry. Co. v. Gray* (Ind. App.), 4 R. R. R. 120, 27 Am. & Eng. R. Cas., N. S., 12

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the train had gone about 150 feet when he received the signal to stop, testified at the last trial, as a matter of estimate, that this distance was 50 or 60 feet, and that the fireman, who did not testify at the first trial on this point, put the distance at 40 or 50 feet, also as a matter of estimate. There was also testimony that the signal to stop was given immediately after the plaintiff disappeared from the steps of the car. Very little reliance, however, can be placed upon the estimate of a witness as to distances. *Sweat v. Railroad Co.*, 156 Mass. 284, 287, 31 N. E. 296. And in a case like this, where there is direct evidence by measurement that the plaintiff was picked up at a point 82 feet south of the platform of the station, we do not think that the jury would be warranted in finding that she fell off before the platform of the station was passed, which is the inference which the plaintiff seeks to draw from the estimates of the engineer and fireman. This was merely a scintilla of evidence, entitled to no weight. We must, however, assume that the plaintiff's eyesight was not hindered by her veil; but, assuming this, the case does not materially differ from that which was presented at the first trial. It is not disputed that she took no means of observing whether the train had started, or not, until she was on the next to the last step of the car. When she opened the door to go outside, she knew that the brakeman had come into the car and shut the door and had sat down,—a fact which ought to have informed her that the train had started, or was about to start. She knew that the other passengers had then left the train, and were on the platform of the station. Notwithstanding these facts, having walked down the aisle with her head bent down, trying to get a pamphlet under the string of a bundle she was carrying, she opened the door and hurried down the steps, and did not notice that the train had started until she reached the next to the last step. We can have no doubt, on the evidence, that the train started while she was in the aisle of the car, and that the plaintiff could have known that the train was in motion if she had looked when she opened the door. Under these circumstances, we are of opinion that the plaintiff was not in the exercise of due care, and that the judge rightly so ruled. *England v. Railroad Co.*, 153 Mass. 490, 27 N. E. 1; *Brown v. Railroad Co.* (Mass.) 63 N. E. 941.

Exceptions overruled.

## LOUISVILLE &amp; N. R. CO. v. SHEPHERD.

(*Court of Appeals of Kentucky*, Oct. 23, 1902.)

[69 S. E. Rep. 1070.]

Carriers—Injury to Passenger—Punitive Damages—Evidence—Amount Awarded.

Plaintiff, a passenger on defendant's train, was standing on the platform of one of the coaches, intending to get off, just prior to a collision,

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when a man, seeing her danger, caught her, and pulled her being pulled from the train, plaintiff's hip was bruised, her feet were and she suffered from the injury on her hip for two or three weeks, she rode to the wreck the next day, and on the succeeding day went to a ball, and danced there: *held* that, it having been previously held under the circumstances attending the collision punitive damages might be recovered, an award of \$400 was not so excessive as to justify reversal.

Appeal from circuit court, Bullitt county.

"Not to be officially reported."

Action by Ora Shepherd against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff defendant appeals. Affirmed.

Fairleigh, Straus & Eagles, for appellant.

Chas. Carroll, for appellee.

HOBSON, J. This is a suit by appellee to recover alleged injuries received by her in a wreck at Gap-in-Bullitt county, December 23, 1899. For the facts in this collision, see *Railroad Co. v. Simpson* (Ky.) 64 S. W. 733; *Same v. Carothers* (Ky.) 65 S. W. 833, 66 S. W. 733; *Same v. Richmond* (Ky.) 67 S. W. 25. In those cases it was held that the proof warranted the submission to the jury of the question of punitive damages. The jury, under instructions which are not complained of, found a verdict for \$400. Appellant insists that the verdict is palpably excessive, and, while it is clear from the evidence that appellee's injuries were serious, still the jury, especially where punitive damages are to be awarded, have a large discretion in cases of this character, and under all the evidence we do not think that we ought to disturb the verdict. Appellee, who was a young lady standing on the platform of one of the coaches near the rear of the train, with the intention of getting off at that station. A gentleman who had gotten off the train saw the plaintiff dashing around the curve behind it, and called to the plaintiff lady to jump off. She did not understand him. He then jumped upon the step of the car, caught her, and pulled her off, jumping to the ground immediately himself. Just as she got to the ground, the freight dashed into the passenger train, mingling the two coaches where appellee stood, and badly wrecking the train. In being pulled from the train, appellee was bruised on the hip, a place as large as one's hand turning blue. It was raining a little. She lost her hat; her feet were also to some extent her clothes. From this she took cold, and suffered also for two or three weeks from the injury on her hip. The next morning she rode in a surrey to the wreck but returned home, and went to bed. That afternoon she went up to see a gentleman who called. The next day she remained in bed, but that evening got up and went to a ball, and danced there, although it made her hip hurt her. After this she remained in bed more or less for some days. Young ladies will sometimes go to balls and the like despite the demands of

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health or the actual pain they may suffer. The sincerity of the testimony as to the extent of appellee's injuries was for the jury, who saw and heard the witnesses. As she had suffered an actual physical injury, she was entitled to recover, not only for physical pain, but for the mental suffering she endured. In such a catastrophe as this was, there must have been no little nervous shock for appellee. There is no accurate measure for determining precisely the amount of damages to be awarded in such cases, and necessarily a greater latitude must be allowed for the common judgment of a jury of 12 unbiased men from the different walks of life, putting together their mutual experience of practical things, than in those cases where the amount of damages may be definitely computed.

Judgment affirmed.

ST. LOUIS S. W. RY. CO. OF TEXAS v. RICKETTS *et al.*

(*Supreme Court of Texas, Nov. 20, 1902.*)

[70 S. W. Rep. 315.]

Carriers of Passengers—Failure to Stop at Station Failure to Heat and Light Depot Liability.\*

Where plaintiff's wife was negligently carried past her station by a carrier, and was compelled to remain in a cold, unlighted depot for several hours, when she drove to the place where she desired to stop, and from the exposure sustained severe injuries, the carrier was liable for any injuries which it should have reasonably foreseen would have resulted from exposure incident to plaintiff's return.

Verdict Impeachment—Affidavits of Jurors.

Affidavits of jurors that, pending their deliberation, the foreman stated that he was familiar with defendant's depot at the place in question, and that it was uniformly not heated, which was a material issue in the case, were inadmissible to impeach their verdict for plaintiff.

Certified questions from court of civil appeals of Fifth supreme judicial district.

Action by R. F. Ricketts and another against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiffs, and defendant appeals to the court of civil appeals. Reversed (54 S. W. 1090), and questions certified.

E. B. Perkins, Geo. E. Perkins, and D. Upthegrove, for appellant.

Evans & Elder, for appellees.

WILLIAMS, J. Certified questions from the court of civil appeals for the Fifth district as follows:

"Appellees, R. F. Ricketts and wife, brought this suit against the appellant to recover damages claimed to have

\*As to the damages recoverable for carrying passengers beyond destination, see note appended to Southern Ry. Co. v. Hardin (Ga.), 10 Am. & Eng. R. Cas., N. S., 250; Louisville & N. R. Co. v. Quick (Ala.), 1 Am. & Eng. R. Cas., N. S., 25; Texarkana & Ft. S. Ry. Co. v. Anderson (Ark.), 18 Am. & Eng. R. Cas., N. S., 37; St. Louis, I. M. & N. Ry. Co. v. Power (Ark.), 16 Am. & Eng. R. Cas., N. S., 1; Airey v. Pullman Palace Car Co. (La.), 11 Am. & Eng. R. Cas., N. S., 836.



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resulted to Mrs. Ricketts for having been carried by station and been exposed to the cold and rain, causing her to be sick, and resulting in her having chronic female trouble, etc. The facts disclose that on the evening of October 29, 1897, appellees and their little girl came from Paris to Greenville, Tex., and stopped at a hotel near the public square. At 2 o'clock on the morning of October 30th they got up and went from the hotel to appellant's depot, and bought tickets to Clinton, the first station west from Greenville, payable therefor. They boarded appellant's train, and the employee of appellant failed to stop the train at Clinton, and carried appellees to Nevada, a station nine miles west of Clinton, where they debarked. The evidence conflicts as to appellant being negligent in failing to stop the train at Clinton. The train on which they were passengers left Greenville at 2 o'clock, and arrived at Nevada about an hour later. The conductor testified that he went into the depot at Nevada and wrote a note to the conductor on the next train to take appellees back to Clinton free of charge, which they refused. Appellees deny this. Appellees remained in the depot building until about 6 o'clock, when they went to a hotel near by and got breakfast. The testimony conflicts as to the condition of the building and as to there being lights or fire in the building during that time. They then got into an open hack, and went back to Clinton through the country, and spent a part of the day at a blacksmith shop, during a part of which time it was raining. From Clinton they went back to Greenville on the next train. Mrs. Ricketts' monthly period was on at the time. She suffered from cold while in the depot at Nevada, and testified that it stopped her sickness, which caused a pain in her back and the lower part of her bowels. After returning home, she was sick for three months, and since then she has been suffering with chronic female trouble. The facts disclose the issue whether or not her condition was caused solely by her stay at Nevada, or was caused by her riding from Nevada to Clinton in an open hack, and remaining in the blacksmith shop while at Clinton during the same day. Upon this issue the defendant asked the following special charge, which the jury refused, to wit: 'You are instructed that defendant would not be liable for any sickness contracted by plaintiff's wife on account of exposure, other than what she did contract while waiting in the depot at Nevada station. And before the jury will allow plaintiff to recover anything on this account, or the medical bills or medicine, the jury must believe from the evidence that the defendant negligently carried plaintiff's wife beyond Clinton station, and afterwards failed to exercise ordinary care for their protection, and that said negligence or want of care was the proximate cause of plaintiff's sickness (if any she had).' The court, in its main charge, instructed the jury, in effect, that plaintiff could only recover for injuries to his wife as the proof showed affirmatively that she had sustained as a direct result of the negligence of the def-



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ant, and further that the burden of proof was upon plaintiff. There is no complaint by appellant that the verdict is excessive.

"First Question. Under the circumstances stated, did the court err in refusing to give the special charge requested, or was the court's general charge sufficient to cover said issue? On the hearing of the motion for a new trial, one of the grounds being the misconduct of the foreman, the defendant offered to prove by two of the jurors who tried the case that, after the jury had retired, and while considering of their verdict, the foreman of the jury stated to the other members thereof that he was satisfied that the plaintiff and his wife had testified the truth about there being no fire or lights in the defendant's station house at Nevada, and that defendant's witnesses who had testified to the contrary had testified falsely; that he (the said Lindsley) had lived near Nevada station for a number of years; that he had been to defendant's depot at that place many times in the nighttime, and that he had never found any light in the waiting room, nor any fire in the stove kept there. This was objected to, which objection was sustained by the court, which action of the court is here assigned as error. On the trial the evidence conflicted as to whether or not there was fire and light in the depot at said time.

"Second Question. Was the testimony offered by the defendant on the hearing of the motion for a new trial admissible? In other words, does the offered testimony show such misconduct on the part of the foreman as will permit the testimony of other jurors to impeach the verdict of the jury? And, if so, was the rejection of said testimony sufficient to cause a reversal of the case?"

1. The refused charge assumed that there was evidence from which the jury could find that Mrs. Ricketts suffered from sickness caused by exposure occurring after she left appellant's station, and sought to have the court declare, as a matter of law, that damages resulting could not be recovered. To justify such an instruction, one of two conditions must have existed, viz.: The pleading of plaintiff must have restricted his claim to the damages caused solely by the exposure in the waiting room; or the evidence must have been such that the court could declare, as a matter of law, that no recovery could be had for sickness resulting from subsequent exposure. The certificate does not so state the pleading, nor can we see that the evidence was such as to justify the court in taking the question from the jury. Since Ricketts and wife were destined for Clinton, appellant, if it wrongfully carried them beyond that point, ought to have foreseen that they would do that which it was prudent for them to do under the circumstances, and to have contemplated any exposure to which they would be subjected in a natural and prudent effort to return. *Railway Co. v. Cole*, 66 Tex. 563, 1 S. W. 629. It was their right to go back, and the question is whether or not, in choosing the means of transporta-

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tion, and in their other conduct, they acted as persons of ordinary prudence; and this was a question for the jury. The circumstances under which and the reasons why they acted as they did are very meagerly stated; but we cannot say the evidence shows affirmatively and beyond reasonable controversy that they were guilty of negligence. *Railway v. Crispi*, 73 Tex. 236, 11 S. W. 187. We answer that "the facts stated" the special charge should not have been given. As it was incorrect, the question whether or not a general charge was sufficiently full does not arise.

2. The decisions of this court have passed upon numerous attacks made upon verdicts of juries, supported by affidavits or testimony of jurors setting up irregularities and improprieties of different kinds, occurring in their deliberations. The court have uniformly denied the competency of such testimony to establish the alleged facts. *Mason v. Russel's Heirs*, 10 Tex. 721; *Handley v. Leigh*, 8 Tex. 129; *Kilgore v. Jordan*, 10 Tex. 346; *Little v. Birdwell*, 21 Tex. 603, 73 Am. Dec. 10; *Boetge v. Landa*, 22 Tex. 106; *Thomae v. Zushlag*, 25 Tex. Supp. 229; *Johnson v. State*, 27 Tex. 769; *Davis v. State*, 28 Tex. 191; *Bank v. Bates*, 72 Tex. 142, 10 S. W. 348; *Railway Co. v. Gordon*, 72 Tex. 51, 111 S. W. 1033; *Letcher v. Johnson*, 79 Tex. 241, 14 S. W. 1010. The precise complaint here made of the conduct of the jurors was not involved in any of the cases cited, but it is evident from the language used in the opinions that this court has adopted the rule that jurors will not, in civil cases, be allowed to impeach their verdict by setting up misconduct, irregularities, or improprieties of themselves and their fellows occurring in the privacy of their deliberations; and this seems to us to be in accord with the great weight of authority. There are some authorities which restrict the rule within narrower limits, but they are evidently not in harmony with the decisions in this state. A modified rule is prescribed by the Code of Criminal Procedure for criminal cases, but the legislature has never been fit to alter the rule enforced by this court in civil cases from the beginning. The proof offered was not admissible.

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NEW YORK, C. & ST. L. R. CO. v. FREMONT, E. & M. V. R. CO. *et al.*

(*Supreme Court of Nebraska, Oct. 22, 1902.*)

[92 N. W. Rep. 131.]

Connecting Carriers—Limiting Liability to Own Line.\*

Although a railroad company enters into a joint contract with a

\*See foot-note appended to *Pittsburg, etc., Ry. Co. v. Viers* (10 R. R. R. 62, 26 Am. & Eng. R. Cas., N. S.; 62.

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Each company for the transportation of goods to a point beyond the end of its own line, it is competent for it to enter into an express contract with the shipper limiting its liability to the transportation of the property over its own line.

#### Service of Process.

An agent employed to solicit traffic for a foreign railroad company, having no line of road in this state, has implied authority to bind his principal for the safe delivery of goods at a point beyond its own lines, and to contract over what road beyond that line the property shall be transported.

Same.

A manager of an agency established in this state by a foreign railroad corporation for the purpose of soliciting traffic over its line of road is a managing agent, within the meaning of the statute with reference to the service of summons upon such corporations.  
(Syllabus by the Court.)

Commissioners' opinion. Department No. 3. Error to district court, Clay county; Hastings, Judge.

Action by the Union State Bank against the New York, Chicago & St. Louis Railroad Company and another. Judgment for plaintiff and against both defendants, and the Fremont, Elkhorn & Missouri Valley Railroad Company and the New York, Chicago & St. Louis Railroad Company bring separate proceedings in error. Judgment affirmed as to the New York, Chicago & St. Louis Railroad Company, and reversed as to the Fremont, Elkhorn & Missouri Valley Railroad Company.

Benjamin T. White, James B. Sheehan, and Leslie G. Murd, for Fremont, E. & M. V. R. Co.

John C. Stevens, for New York, C. & St. L. R. Co.

Thomas H. Matters, for Union State Bank.

AMES, C. This is an action to recover damages for injuries to a car load of horses, alleged to have been suffered in the course of transportation from Harvard, in this state, to Belvidere, N. J. On the 13th day of February, 1897, the plaintiff below, the Union State Bank, entered into a contract for the shipment of the horses, which was signed by an agent of the bank and an agent of the plaintiff in error, the Fremont, Elkhorn & Missouri Valley Railroad Company, the terms of which, so far as they are pertinent to this controversy, are as follows: "Harvard, Nebraska Station, February 13, 1897. Hour: 3:10 p. m. Received of Union State Bank one car horses, to be delivered to Nickel Plate Road for Belvidere, New Jersey, at Union Stock Yards station, Chicago, Illinois.

\* \* \* And in this case the railroad company upon whose road the accident, loss, or damages shall occur shall alone be liable therefor, and no suit shall be brought or claim made against any other company forming a part of the route for such loss or damage (it being expressly understood and agreed that the responsibility of these companies shall cease upon delivery of said property to their connecting line, unless otherwise agreed to in writing, and said written agreement

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signed by the respective parties thereto).'' It is not disputed that the Fremont, Elkhorn & Missouri Valley Railroad Company literally kept the stipulations, performance of which was imposed upon it by this contract; and it is not contended that the horses suffered any injuries, for which damages were recoverable, during their transit from Harvard and until their delivery to the plaintiff in error the New York, Chicago & St. Louis Railroad Company, commonly called the "Nickel Plate Road," at the Union Stock Yards station in Chicago. The facts thus far stated are either admitted or proved without contradiction, and, if this was all there is of the case, the record would present no matter of legal controversy, because there would be no question that the trial court erred in refusing to instruct the jury that the Fremont, Elkhorn & Missouri Valley Railroad Company had incurred no liability.

Section 5, art. 1, c. 72, Comp. St., which is much relied upon by the defendant in error, would be without application to such a state of facts, for several reasons, among which are, that this section has reference to the legal effect, not of express contracts between shippers and railroad companies, but to that of notices by the latter to the former, which are quite different matters, and, further, that in the absence of evidence of fraud or mistake a party is conclusively presumed to have had notice of the contents of formal written contracts executed by him, and, finally, that the company appears to have fully discharged and satisfied every liability incurred by it as a common carrier, so that, if the contract does by its terms purport to limit such liability, there is no fact or circumstance connected with the transaction upon which such limitation could have had operation.

At and before the making of this contract and the shipment of the horses, and subsequently, the plaintiff in error the New York, Chicago & St. Louis Railroad Company maintained an office at the city of Omaha, in this state, under the general charge of one Bernard E. Morgan, for the purpose of carrying on the business of securing freight and traffic to be carried on over its line of road, extending eastward from Chicago and St. Louis. In the conduct of this business Morgan was authorized to employ and did employ subagents or solicitors, among whom was one A. L. Armstrong. Shortly before the date above mentioned, Armstrong obtained through one Bentzer, a traveling freight agent of the Fremont, Elkhorn & Missouri Valley road, an introduction to the officers and agents of the plaintiff bank, and solicited from them the shipment of the horses eastward from Chicago over the line of the corporation represented by him. As a result of this solicitation, and of negotiations and agreements growing out of it, the horses were on the day of the making of the above contract, and as a part of the same transaction, shipped on board the cars of the Fremont, Elkhorn & Missouri Valley Company to Harvard, and a bill of lading was issued therefor by



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latter, naming N. B. Updike, an agent of the plaintiff bank, as both consignor and consignee, and Belvidere, N. J., as the place of destination, by way of the Nickel Plate road. At the same time the total amount of freight charges from Harvard to Belvidere was paid to the agent of the Fremont, Elkhorn & Missouri Valley Company, who alone signed the bill of lading. There was no written stipulation with respect to the lines over which the horses should be transported beyond the eastern terminus of the New York, Chicago & St. Louis Company, but the evidence is practically without dispute that it was orally agreed between Updike, the agent of the bank, and Armstrong, that they should be carried from Buffalo to Phillipsburg over the Lehigh Valley & Hudson River road, and from the latter point to Belvidere over the Pennsylvania road, and that this agreement was an indispensable inducement to Updike to consent to their being delivered to the New York, Chicago & St. Louis Company. The shipment was delivered at Phillipsburg to another railroad, upon which it is alleged that the animals suffered the injury for which damages are claimed, on account of the lack of facilities of the company for caring for them, and as a consequence of the negligence and wrongful conduct of its agents and employees. The plaintiff below recovered a verdict and judgment against both defendants jointly, and the railroad companies, having filed separate motions for a new trial, prosecute separate petitions in error to this court.

With respect to the Fremont, Elkhorn & Missouri Valley Company, it is entirely clear that it was entitled to a peremptory instruction in its behalf, unless it is obligated in some manner not indicated by the above quoted contract between itself and Updike, the agent of the bank. It does not appear to us that it was so obligated. The contract mentioned, the bill of lading, the conversations between Updike and Armstrong, the agent of the Nickel Plate, and the shipment of the horses, were all of the same date, and parts of the same transaction. It cannot reasonably be supposed that the waybill and the receipt of the tariff charges by Kempster, the local freight agent of the company, were intended or supposed by the parties, or any of them, to have the effect of superseding and annulling the terms of the formal contract explicitly reciting and defining the duties of the company. They are more properly to be regarded as additional and supplemental thereto, and as having had for their main purpose the carrying out of the agreement between the shipper and Armstrong, the routing of the property from Chicago to destination by way of the New York, Chicago & St. Louis Railroad Company and the other lines mentioned, and the collecting for the last-named company of the charges for the transportation beyond Chicago. To this extent the case is analogous to that of a contract made in the name of one party for the benefit and in the behalf of another. In such cases it is true that, as a general rule, both the party beneficially interested and the per-



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son by and in whose name the contract is made are liable for its breach. But we think that in the case at bar the agreement first above mentioned limited and qualified that created by the bill of lading and shipment, and is sufficient to overcome the presumption otherwise arising from these facts of the collection of the freight charges. By this construction of the several agreements, oral and written, and the circumstances of the transaction, appear to be consistent with themselves and with each other, and such a construction is obligatory upon the courts in all cases in which the intention of the parties and the subject-matter of the agreement and the attendant facts will permit of it. We are therefore of opinion that the decision of this court in *Railroad Co. v. Palmer*, 38 Neb. 463, 56 N. W. 957, 22 L. R. A. 335, is applicable to this feature of the case at bar. The sum paid by the shipper to the Fremont, Elkhorn & Missouri Valley Railroad Company was the aggregate of freight charges for the whole distance over which the animals were to be carried, and all the facts, taken together, disclose a joint contract between the part of the two companies to transport the property from Harvard, Neb., to Belvidere, N. J., but their respective liabilities were so distributed that that of the last-named company was restricted to safe delivery to the connecting line at Chicago. This restriction was not, under the circumstances, invalid, or a limitation of the common-law liability of the Fremont, Elkhorn & Missouri Valley Company, in violation of the constitution or statutes of this state, because, as is recognized in the opinion in the case above cited, a common carrier is not bound to accept goods for transportation beyond the end of its own line, and it follows that, although it may contract jointly with another carrier for the safe delivery of property to the latter at that point, it may, by express stipulation, relieve itself of responsibility with the connecting carrier for the further carriage of them. That a railroad company is not, in the absence of an express or implied contract, bound for the transportation of property beyond the terminus of its own road, was expressly ruled by this court in *Railroad Co. v. Waters*, 50 Neb. 592, 70 N. W. 225, and such is of great weight of authority in this country. *Myrick v. Railroad Co.*, 107 U. S. 106, 1 Sup. Ct. 425, 27 L. Ed. 325. See also, *Mulligan v. Railroad Co.*, 36 Iowa, 186, 14 Am. Rep. 1; *Detroit & M. R. Co. v. Farmers' & Millers' Bank*, 20 Wis. 54; *Berg v. Railroad Co.*, 30 Kan. 561, 2 Pac. 639, 16 Am. & Eng. R. Cas. 229; *Taylor v. Railroad Co.*, 32 Ark. 399, 29 Am. Rep. 1; *Banking Co. v. Avant*, 80 Ga. 195, 5 S. E. 78; *Railroad Co. v. Harris*, 26 Fla. 148, 7 South. 544, 23 Am. St. Rep. 1; *Goodman v. Navigation Co.*, 22 Or. 14, 28 Pac. 894; *McIntosh v. Railroad Co.*, 84 Tex. 352, 19 S. W. 547, 55 Am. & Eng. R. Cas. 406, 16 L. R. A. 39, 31 Am. St. Rep. 51; *Railroad Co. v. Swenson* (Tex. Civ. App.) 25 S. W. 47; *Pendergast v. Press Co.*, 101 Mass. 120; *American Exp. Co. v. Second*

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Bank, 69 Pa. 394, 8 Am. Rep. 268; Jennings v. Railway Co., 127 N. Y. 438, 28 N. E. 394, 49 Am. & Eng. R. Cas. 98.

But it was held in Railroad Co. v. Palmer, supra, that such a contract may be implied from the receipt of freight charges for the whole distance, and its existence is further established in this case by the uncontradicted evidence of conversations between the shipper and Armstrong, the agent of the New York, Chicago & St. Louis Company, which established an agreement not contradictory, but supplemental, to that implied by the bill of lading and other circumstances above detailed, and which was, as has been said, a part of the same transaction. There is therefore no variance between the proof and the petition as respects the joint character of the contract on the part of the two railroad companies. It is undisputed that the horses were diverted from the route specified in the oral agreement, as alleged in the petition of the plaintiff, and that after their diversion they were injured while in the custody of the carrier. All of the foregoing matters are therefore to be disposed of as questions of law, and it is unnecessary to discuss any of the instructions complained of, except the refusal to give a peremptory instruction for a verdict.

There was at the trial no question properly to be left to the jury, except that of the amount of damages, concerning their disposition of which there is no complaint in the briefs of the plaintiffs in error. But it is insisted that Armstrong, the solicitor of the New York, Chicago & St. Louis Company, had no authority to stipulate concerning the route of the shipment beyond the line of his employer, or to contract a liability for carriage beyond that line, and that Morgan, upon whom service of summons was made in this case, was not a managing agent of the company, within the meaning of our statutes. Neither of these objections is well taken. Morgan was the manager of an agency maintained in this state for the express purpose of soliciting traffic for his corporation, which was foreign to this state, and had no line of road entering at its territory, and Armstrong was one of his employees in the business. Such persons, by the very nature of their employment, are represented to the public to have authority to do any act or enter into any contract for their principal pertaining to the business which they have in charge, and which has a tendency to promote its successful conduct. Obviously, one of the most frequently requisite of such acts would be the routing of goods over the defendant's line as an intermediate line to the points of destination. Without such routing, the shipment in question could not have been secured, and the case may be taken as fairly illustrative of the character of the business in which the agency was engaged.

It is recommended that the judgment of the district court in so far as it affects the plaintiff in error the New York, Chicago & St. Louis Railroad Company, be affirmed, and that

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in so far as it affects the plaintiff in error the Fremont, horn & Missouri Valley Railroad Company it be reversed a new trial granted.

PER CURIAM. For reasons stated in the foregoing opinion, it is ordered that the judgment of the district court in so far as it affects the plaintiff in error the New York & Chicago & St. Louis Railroad Company, be affirmed, and in so far as it affects the plaintiff in error the Fremont, horn & Missouri Valley Railroad Company it be reversed a new trial granted.

DUFFIE, C. I concur in the conclusion reached in the foregoing opinion, and with the reasons given therefor. In my mind, it is plain that there is no conflict between this case and the case of Railroad Co. v. Palmer, 38 Neb. 463, 101 W. 957, 22 L. R. A. 335. The facts in this case are so different from those in the Palmer Case that the latter cannot be considered a precedent by which this should be ruled. In the Palmer Case a bill of lading was issued which limited the liability of the receiving company to its own line, which extended to Grand Island, 24 miles distant from Hastings, the place of shipment. The plaintiff insisted that he had an oral contract with the agent of the road for the carriage of his goods to their destination,—Grant's Pass, Or.; that the agent had received the freight charges for the entire distance and that he signed the bill of lading issued by the company in the belief that it was a receipt for the freight charges and in ignorance of the clauses therein limiting the liability of the company. The principal controversy in that case was in relation to the terms of the contract of shipment; the plaintiff insisting that the contract was an oral one that provided for the through shipment of his goods, and that his signature to the written contract or bill of lading had been fraudulently obtained in the belief that it was a receipt, while the company insisted that the bill of lading truly set forth the contract entered into by the parties, and that its liability did not extend beyond its own line. The bill of lading contained a clause limiting the liability of the company to \$5 per 100; and the opinion, after calling attention to article 11, § 4, of the constitution, which prohibits any limitation upon the liability of a railroad company as a common carrier, and to former decisions of the court holding that liability cannot be limited even by express contract, turns to a discussion of the question whether the contract of carriage was to the end of its own line or to the point where the goods were delivered to the next carrier, or to the final point of delivery. Relating to this question, the opinion is as follows: "It is well settled that at common law the common carrier is not liable for loss or damage to goods delivered to him, beyond the point at which he delivered the goods to a connecting carrier. To this it should be added that the contract of the shipper was with

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carrier first receiving the goods, and if such carrier undertook to deliver the goods at their destination, even though it contemplated doing so through intermediate carriers, it assumed a liability of such character for every part of the route. Many cases hold that receiving goods marked for a point beyond the end of the receiving carrier's route is evidence of a contract to deliver them as marked. In this case the bill of lading was executed in duplicate. In one of the copies the destination was left blank. In the other the language was: 'Received of Palmer and Pardee the following described package, in apparent good order, marked and consigned as noted below, contents and value unknown, to be transported to Grant's Pass, Or., and delivered at the railroad depot at that point.' Both copies in writing show that the goods were consigned to Pardee at Grant's Pass, Oregon. The negotiations as to the freight were, according to the uncontradicted testimony, with a view to prepaying all the pay through. Hastings was only twenty-four miles from Grand Island, where the car was delivered to the Union Pacific; and the \$200 received by the railroad company, if not intended as a full prepayment of the freight to Oregon, was certainly intended to apply on the freight throughout the whole distance. There is no possible view of the evidence from which it could be inferred that the railroad company had only contracted to deliver the goods to the next carrier." It will be observed that the opinion treats the payment to the first or initial carrier of the freight charges for the whole distance as presumptive only that the contract of carriage was a through contract, and that, together with the fact that the goods were received at a point but 24 miles distant from the terminus of its line, and that the bill of lading itself recited that the goods were "to be transported to Grant's Pass, Or., and delivered at the railroad depot at that point," was conclusive that the contract was one for through shipment. We entirely agree with the writer of the opinion, under the facts in that case that, "there is no possible view of the evidence from which it could be inferred that the railroad company had only contracted to deliver the goods to the next carrier." The bill of lading in the case at bar recited the following: "Received of Union State Bank one car horses, to be delivered to Nickel Plate Road for Belvidere, N. J., at Union Stock Yards station, Chicago, Ill." As we interpret this agreement, the contract of carriage extends to Chicago only, and the circumstances under which it was made give force to this construction. The evidence shows that some time previous to February 13, 1897, one Armstrong, a freight solicitor of the Nickel Plate Road, learned that the Union State Bank was about to ship two cars of stock from Harvard, Neb., to Belvidere, N. J., and requested L. G. Kempster, the local agent of the Elkhorn Company, to introduce him to the officers of the bank. The Elkhorn Company had already secured the shipment to Chicago, and was not interested in



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the shipment east of that point. The introduction was as requested, and Armstrong contracted to receive the ment at Chicago from the Elkhorn Company, and to tra the same over the Nickel Plate road to Buffalo, and ward it to its destination over certain roads named b bank. When shipment was made on the 13th, the bill ing was made out and signed by the parties. The charges for the entire route were paid to the Elkhorn pany, and this, in the absence of a special agreement contrary, would be presumptive that the company contracted to deliver the freight at Belvidere, N. J., it mate destination; but in the face of the express agre which, as we have said, is a contract on the part of th horn Company to carry to Chicago only, their liabil carriers ceased at that point, and that company can held liable for injuries to stock received on the othe over which it was being transported. As said in *Re Co. v. Waters*, 50 Neb. 592, 70 N. W. 225, "A railroad pany, receiving for shipment goods consigned to a po the line of a connecting carrier under an agreement to port them to the terminus of its own road, is neither at mon law, nor by statute of this state, answerable therefor their safe delivery to the connecting line named in the lading or contract of shipment."

ALBERT, C. On a re-examination, I fully concur foregoing.

### HATHAWAY v. NEW YORK, N. H. & H. R. Co.

(*Supreme Judicial Court of Massachusetts, Bristol, Nov. 25, 1891*)

[65 N. E. Rep. 387.]

#### Railroads—Injuries to Licensees—Freight Yards—Approach to

Where a licensee went to a railroad yard at night to unload which he was required to take from the cars under the contract riage, and, having paid the freight, started to walk along platfo uneven width, which were used in transferring freight from cars freight house, and was injured by stepping or falling from a jog of the platforms by reason of its not being lighted, he was not ent recover therefor, the railroad having furnished other means of ap to that part of the yard beyond the freight houses where the cars unloaded by consignees were left.

Exceptions from supreme court, Bristol county; *Fre G. Fessenden*, Judge.

Action by Henry C. Hathaway against the New York, Haven & Hartford Railroad Company. Judgment for defendant, and plaintiff brings exceptions. Overruled.

A. Edwin Clarke and A. B. Collins, for plaintiff.  
Frederick S. Hall, for defendant.

\*As to the care due licensees at stations, see foot-note appen *O'Leary v. Erie R. Co.* (N. Y.), 4 R. R. R. 229, 27 Am. & Eng. R. N. S., 229.



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BARKER, J. The plaintiff was required, by the contract under which the horses were brought over the railroad, to unload them from the car. This involved his entering the freight yard and going to the place in it where the horses were to be taken from the car. There was a public street at the south end of the yard, and a gate gave access to the yard from the street. In the yard were three freight houses, extending northerly, the ends of which were contiguous. On the westerly sides of the houses were platforms designed and used for the transfer of goods between the houses and cars. These platforms were of unequal widths, those upon the side of the farther houses being narrower than the platform of the first house. The plaintiff entered the yard through the gate, and went to the office in the house nearest the street, and there paid the freight bill. He then asked the night watchman if he was going out to deliver the horses, and, receiving an affirmative answer, said, "Well, come on," to which the watchman replied, "Well, you go ahead out there, and I will be out in a few moments." This was in the night, and the plaintiff had no lantern. The car was upon the tracks and beyond the freight houses. The plaintiff passed from the office into the first house, and, instead of walking through the houses, went through an open door upon the platform, and walked down the platform toward the place where he expected to get the horses. The platform upon which he first came from the door was about twice as wide as those further along. There was evidence tending to show that the freight house from which he went upon the platform was so filled with merchandise that he could not walk through it, but this evidence was contradicted. The platforms were not well lighted, and the plaintiff, in attempting to follow them, walked off the side at a point beyond the jog, and fell. The negligence charged was a failure to light the platform at the point where it was narrowed up. The plaintiff often had been at the freight yard, and knew its general arrangement, but testified that he never had had his attention called to the narrowness of the platform. He usually went through the freight houses when going to receive horses, and would have done so that night but for finding them full of goods. We are of opinion that the verdict for the defendant was ordered rightly. The platform was not a way provided by the defendant for persons to go to cars in the yard, nor was it held out by the defendant to be such a way. It was made and fitted for another purpose, namely, the transfer of goods to and from cars on the adjoining tracks. So, also, the freight houses through which the plaintiff had gone on previous occasions were not designed as a way to the yard, but for the reception, storage, and handling of goods, and filling a house with goods could not be said to be the obstruction of a way designed to give access to cars in the yard. If the plaintiff, being required to unload the horses,

was entitled to have some reasonable method of access to the car containing them afforded him, and might have declined to attempt to find his way to the car in the dark and without guide, he did not so decline. On the contrary, he voluntarily sought to find a way, and, when he found his approach through the houses obstructed by goods, he voluntarily chose as a way a series of platforms which he knew were made for the handling of goods, and which obviously were so dark as to make dangerous his use of them to gain access to the car he was seeking. If this could be found to be due care, it would be a voluntary acceptance of the danger of walking off the platform while on his journey to the car. The platform was not a proper one for the purposes for which obviously it was intended, and the plaintiff was not injured by reason of a hole in it, or any defect in its surface, or any obstruction upon it, or any breakage of the structure. Choosing to use it in the darkness as a way, he voluntarily incurred the risk of walking off the edge of it and of falling. The facts that the platform was not designed or held out as a way, and that there was no defect in its structure, having regard to the purposes for which it was made and used, distinguished the case from those relied on by the plaintiff. In *Holmes v. Railway Co.*, L. R. 4 Exch. 254, L. R. 6 Exch. 123, 40 Law J. Exch. 121, the plaintiff was upon a flagged walk used by customers as a way, and which he must use to get his coals. The statement of Cleasby, B., in *Wright v. Railway Co.*, 1 Q. B. 252, at page 257, that *Holmes v. Railway Co.* "establishes that where a man is on the premises of a railway company for the purpose of carrying into effect a contract of carriage and delivery, and gets the assent of the company (indicated by the usual course of business) to assist in the delivery, the plaintiff is entitled to redress if the part of the premises where he is engaged is in a condition which is dangerous to the persons engaged upon it and injury ensues to him," must be read in view of the fact that the place where the person hurt was designed for use in the way in which he was using it, and that he was there by an invitation which held the place out as one to be used for that purpose. It did not go to the extent of allowing a recovery because any place to which the plaintiff, of his own choice, might go, in the railway grounds, might be dangerous. In *Wright v. Railway Co.*, L. R. 10 Q. B. 298, 1 Q. B. Div. 252, the plaintiff negligently run into by a train while assisting to move the goods in which was his heifer, which was to be delivered to him. In *Sharrock v. Railway Co.*, 1 C. P. Div. 70, the plaintiff specially directed to a siding outside the freight yard, while proceeding to it his horse became frightened, and fell down an unfenced bank. In *Marney v. Scott* [1899] 1 Q. B. 986, the plaintiff was hurt by the breaking of a ladder which was his way to the hold of a vessel. In *Bradford v. Boston & M. R. R.*, 160 Mass. 392, 35 N. E. 1131, *Toomey v. S.*

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orn, 146 Mass. 28, 14 N. E. 921, and Marwedel v. Cook, 154 Mass. 325, 28 N. E. 140, the plaintiffs were hurt upon places designed and fitted for foot travel.

It is contended that it should have been left to the jury to say whether the platform was the passageway which the defendant had provided for the plaintiff. The arrangement of the yard makes it plain that there were other means of approach to that part of it beyond the freight houses where cars to be unloaded by the consignees were left, and, while the platform was designed for other purposes than a passageway, there is no evidence that it was allowed to be used for the latter purpose. Whether or not it might have been found that the plaintiff's situation allowed him to use the platform for a passageway, we think that in entering upon it as he did he used it at his own risk, so far as its construction, shape, and condition as to light were concerned.

Exceptions overruled.

## CALVERT v. SOUTHERN RY. CO.

(*Supreme Court of South Carolina, May 6, 1902.*)

[41 S. E. Rep. 963.]

Foreign Corporations—What Constitute—Removal of Causes.\*

A railroad company incorporated under the laws of another state is a nonresident of South Carolina for the purposes of removal of causes to a federal court, though it has complied with the requirements of Act March 19, 1896, providing that thereupon such a corporation shall become a domestic corporation, with all the rights and liabilities thereof. Gary, A. J., Pope, J., and Townsend, Circuit Judge, dissenting.

On petition for rehearing. Reversed.

For former opinion, see 36 S. E. 750.

JONES, J. The question presented in this case is whether the defendant, Southern Railway Company, being sued in the state court by a citizen of this state, was entitled to remove the cause to the United States circuit court upon the ground of diverse citizenship. It appears that a petition for removal, with a properly executed bond, was duly filed. The petition shows that the defendant company was incorporated under the laws of Virginia on the 8th day of June, 1894, and subsequently complied with the act approved March 1896, entitled "An act to provide the manner in which railroad companies incorporated under the laws of other states or countries may become incorporated in this state," by filing a certified copy of its charter in the office of the secretary of state, and causing a certified copy thereof to be recorded in the office of the register of mesne conveyances or clerk of the court of common pleas in each county in which such corporation proposed to carry on business or acquire property. The

\*See Calvert v. Southern Ry. Co. (S. Car.), 19 Am. & Eng. R. Cas., S., 173, and note at end of case.



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third section of said act provides: "That when a foreign corporation complies with the provisions and requirements of this act, it shall ipso facto become a domestic corporation and shall enjoy the rights and be subject to the liabilities of such domestic corporation; it may sue and be sued in the courts of this state, and shall be subject to the jurisdiction of this state as fully as if it were originally created under the laws of the state of South Carolina." 22 St. at Large, pp. 114. The question, then, is whether a corporation originally created in one state and subsequently adopted in another state becomes a "citizen" of the latter state for purposes of federal jurisdiction, so as to be entitled to remove the cause to a federal court, when the plaintiff is a citizen of the state against the foreign corporation. Strictly speaking, corporations are not citizens, but artificial persons or bodies. The federal courts, however, take jurisdiction of corporations by looking beyond the artificial body to the individuals of which it is composed as the real parties in interest. The rule at that time prevailed that federal jurisdiction existed when all the corporation or stockholders were citizens of a state or a state different from that of the adverse party. *Bank v. De Vries*, 5 Cranch, 61, 3 L. Ed. 38; *Bank v. Slocomb*, 14 Pet. 6, 4 L. Ed. 354. But the practical difficulty in applying this rule in view of the unknown and ever varying list of shareholders or stockholders, or the fact that federal jurisdiction over the interests represented by corporations could be wholly defeated by having but a single stockholder in every state wherein the corporation did business, doubtless led to the rule which now prevails. Since the case of *Railroad v. Leston*, 2 How. 11 L. Ed. 353, it has been firmly established that there is an indispensible presumption that the incorporators of a corporation are citizens of the state which originally created the corporation. *Railroad Co. v. James*, 161 U. S. 545, 16 Ct. 621, 40 L. Ed. 802; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081. In the *James Case*, supra, Etta James, a citizen of Missouri, brought an action for the negligent killing of her husband at Monett, in Missouri, where he resided, in the United States circuit court in Arkansas, against the St. Louis, etc., Railroad Company, originally created a corporation in Missouri and domesticated in Arkansas by compliance with the Arkansas statute, substantially as the act of 1890, supra. The defendant waived its personal privilege of being sued in the district of which he was an inhabitant, but raised the objection that the circuit court in Arkansas had no jurisdiction, on ground that the defendant was not a citizen of Arkansas, but was a citizen of Missouri, of which state the plaintiff was a resident and citizen. The United States supreme court held, on the question proposed for determination, that the Missouri corporation, by compliance with the Arkansas statute, did not become an Arkansas corporation.

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such a sense as to make it a citizen of Arkansas, so as to subject it to a suit in the federal circuit court by a citizen of the state of its origin. The facts which may be said to distinguish the James Case from the case at bar do not seem to be at all material, for the question was one of citizenship, and the vital principle announced is that a corporation originally created in one state does not, for purposes of federal jurisdiction, become a citizen of another state by compliance with a statute of the latter state with provisions like our statute of 1896. In the case of *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081, a corporation created in Indiana brought an action in the federal court in Kentucky against several Kentucky corporations. There was a plea to the jurisdiction, asserting that the plaintiff was a corporation and citizen of Kentucky, of which state the defendants were corporations. There was a contest as to whether the Indiana corporation had accepted the provisions of a Kentucky statute, which it was alleged constituted it a corporation of Kentucky. The supreme court, on the question of jurisdiction, said: "The acts done by the Louisville, New Albany & Chicago Railway Company under the statute of Kentucky, while affording ample evidence that it had accepted the grants thereby made, can hardly affect the question whether the terms of these statutes were sufficient to make the company a corporation of Kentucky. But a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this court to be required for the disposition of this case, either as to the jurisdiction or as to the merits. As to the jurisdiction, it being clear that the plaintiff was first created a corporation of the state of Indiana, even if it was afterwards created a corporation of the state of Kentucky also, it was, and remained for purposes of the jurisdiction of the courts of the United States, a citizen of Indiana, the state by which it was originally created. It could neither have brought suit as a corporation of both states against a corporation or other citizen of either state, nor could it have sued or been sued as a corporation of Kentucky in any court of the United States." It is true that the Southern Railway Company became a corporation of South Carolina by compliance with the act of 1896 (*Railway Co. v. Thompkins*, 48 S. C. 49, 25 S. E. 982), but, as shown above, this fact is not material on the question whether the Southern Railway Company thereby became a citizen of South Carolina for purposes of federal jurisdiction, when it appeared that said corporation was originally created in, and thereby became a citizen of, Virginia. Let us for a moment examine the act of 1896, *supra*. By its title it purports to provide the manner in which railroad corporations, companies incorporated in other states, may become incorporated in this state. By the third section, quoted already, it is provided that when the foreign corporation complies with the provisions and requirements of the



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act it (the foreign corporation) shall ipso facto become a domestic corporation, etc. The act does not provide for the creation of a new and distinct corporation out of natural persons or other corporations, whose citizenship could be imputed to the new corporation, but it operates solely in the case of a corporation, as to which there is an indisputable presumption that its corporators are citizens of the state originally created by it. So to speak, the only corporator in the South Carolina corporation is the foreign corporation or its corporators conclusively presumed to be citizens of Virginia. It would be clear in such case that the indisputable presumption of citizenship which attaches to the foreign corporation for purposes of federal jurisdiction would follow it on its mere adoption as a domestic corporation in another state. Keeping in mind that the mere fact that the Southern Railway Company became a South Carolina corporation is not conclusive as to the question of citizenship, as shown in the Louisville Trust Co. Case, supra, and keeping in mind that the federal court looks beyond the mere corporate entity, and impute to the corporation the citizenship of its corporators, it would seem impossible that the indisputable presumption of citizenship attaching to a foreign corporation would not be overthrown by a contrary indisputable presumption,—the foreign corporation becoming a domestic corporation by filling a certified copy of its charter with the secretary of state and the county recording officer, ipso facto becoming a domestic corporation. Quite a different question was presented in *Memphis & C. R. Co. v. Alabama*, 2 Sup. Ct. L. Ed. 518, for by the Alabama statute, which sought to incorporate the Memphis & Charleston Railroad Company, there being a railroad of the same name incorporated in Tennessee, it was provided, among other things, that before subscription to the capital stock should be opened in Alabama so as to afford the citizens thereof an opportunity to purchase stock. This and other provisions of the act shows that the Alabama corporation, although of the same name as the Tennessee corporation, was to be a new corporation, composed of natural persons, and organized under the laws of Alabama, and hence was not entitled to remove to the federal court. Suit against it by the state of Alabama, for the use of justice in that county therein. Says Mr. Justice Shiras in the *Jamez* case, supra, speaking for the court, in language quoted with approval in the *Louisville Trust Co. Case*, supra, by Mr. Justice Gray, delivering the opinion therein: "It is not to bring such an artificial body as a corporation into existence, but to bring the spirit and letter of that constitution, as construed by the decision of this court, it would be necessary to create a corporation of natural persons, whose citizenship of the state created could be imputed to the corporation itself. But it is not intended in the present case that natural persons residing in and citizens of Arkansas were, by the legislation in question, created a corporation, and that, therefore, the citizen-

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individual corporators is imputable to the corporation." The question being a federal question, the state court is bound to follow the decisions thereon by the United States supreme court, the tribunal invested with power to finally determine the question; and under our interpretation of the decisions of that court we can reach no other conclusion than that the Southern Railway Company is not a citizen of South Carolina, but is a citizen of Virginia, for purposes of federal jurisdiction. This presents a case of diverse citizenship, which entitled the defendant company to remove the cause to the federal court. The state circuit court, having denied this right, and proceeded with the trial, committed reversible error; for it is well settled that when a sufficient case for removal is made in the state court the rightful jurisdiction of the state court comes to an end, and no further proceedings can be properly had unless in some form its jurisdiction is restored. *Railroad Co. v. Koontz*, 104 U. S. 5, 26 L. Ed. 354; *Kern v. Huidekoper*, 103 U. S. 485, 26 L. Ed. 354. Under this view, the judgment of the circuit court should be reversed, and it is so adjudged.

McIVER, C. J., and ALDRICH, Circuit Judge, concur. HATTS, Circuit Judge, concurs, for reasons stated by him in *Johnson v. Railway Co.*, 41 S. E. 971. POPE, J., and TOWNSEND, Circuit Judge, dissent.

GARY, A. J. (dissenting). This is an action by W. A. Calvert, a citizen of South Carolina, as administrator of D. C. Calvert, deceased, who was at the time of his death a citizen of South Carolina, for \$10,000 damages, resulting from the alleged negligent killing of the deceased by the defendant in Abbeville county, state of South Carolina, on the 7th day of March, 1899. The complaint alleges that on the 7th of March, 1899, the defendant was, and is now, a corporation duly authorized under the laws of the state of South Carolina to conduct and operate a general railroad business in this state. The defendant, in its answer, denies that it is a corporation under the laws of South Carolina. The cause was called for trial on the 3d of October, 1899, and upon the hearing the following facts were admitted: "(1) That Southern Railway Company, on the 18th day of June, 1894, became a corporation under the laws of the state of Virginia. (2) That said Southern Railway Company has complied with the constitution (article 9, section 1) and with the acts of assembly of said state in reference to foreign corporations doing business in this state, by filing with the secretary of state a certified copy of its charter on the 1st day of January, 1897, and by filing the same with the register of mesne conveyances of Abbeville county, on April 1st, 1896. (3) That on the 7th day of July, 1899, the defendant appeared with the clerk of the court of common pleas of Abbeville county its petition for removal of this cause to the circuit court of the United States for the district of South Carolina,

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and accompanied said petition with a properly executed bond as required by law. Said petition and bond were filed within the time required by the statutes of South Carolina in answering the complaint herein. (4) That thereafter, on the 15th day of July, 1899, the defendant served upon plaintiff's attorneys its answer in this case. (5) That within the time required by law the defendant filed with the clerk of the United States circuit court for the district of South Carolina a certified copy of the record in said cause, and procured said cause to be docketed in said last-named court. The plaintiff does not waive its objection that such filing and docketing cannot be made until the state court signs an order for the removal of said cause to the United States circuit court. (6) That, notwithstanding said proceedings for removal, the plaintiff has procured said cause to be docketed upon call of the court of common pleas for Abbeville county." The defendant objected to the jurisdiction of the court on the following grounds: "That it is a nonresident of the state in which the suit is brought, to wit, the state of South Carolina, but a corporation under the laws of the state of Virginia; that, prior to the time when the defendant was required by the laws of South Carolina to answer or plead to the complaint, it did not appear with the clerk of the court of common pleas for Abbeville county, South Carolina, its petition for the removal of said cause to the circuit court of the United States for the district of South Carolina. After argument, his honor, the presiding judge, overruled the objection by a formal order, whereupon the defendant appealed upon exceptions assigning error to the part of the presiding judge in refusing to grant an order removing the case to the circuit court of the United States for the district of South Carolina."

We approach the solution of the question presented by this appeal with feelings expressed by Mr. Justice Douglas in *Ham v. Telephone Co.* (N. C.) 36 S. E. 269, in which he said: "No court has a right to abandon its own lawful jurisdiction when properly invoked, any more than it has to infringe upon the exclusive or paramount jurisdiction of another tribunal. The state court clearly has original jurisdiction of the case at bar, subject to be defeated by the defendant's right of removal, if such right exists. Such existing right of removal may be waived by the defendant, or, rather, it is lost if not claimed in apt time, and in strict accordance with the provisions of the statute. The petition, taken in connection with the complaint, must show a prima facie right of removal, in the event it is the duty of the state court to grant the order of removal and stay all further proceedings. If the defendant does not show a prima facie right, it is the duty of the state court to retain the cause for such further proceedings as may be proper. It is not a question of discretion for the trial tribunal, but one of absolute right, involving the vital question of jurisdiction; and the relinquishment of jurisdiction by the state court, or its assumption by the other would not confer the right



moval if it did not already exist. It would seem that for the purposes of the motion disputed facts are properly determinable by the federal courts; but the principle is fully recognized by the supreme court of the United States that 'the state court is not required to let go its jurisdiction until a case is made which, upon its face, shows that the petitioner can remove the cause as a matter of right.' Removal Cases, 100 U. S. 457, 474, 25 L. Ed. 593; *Amory v. Amory*, 95 U. S. 186, 24 L. Ed. 428; *Yulee v. Vose*, 99 U. S. 539, 545, 25 L. Ed. 355; *Stone v. South Carolina*, 117 U. S. 430, 432, 6 Sup. Ct. 799, 29 L. Ed. 962; *Howard v. Railway Co.*, 122 N. C. 944, 953, 954, 29 S. E. 778; *Bradley v. Railroad Co.*, 119 N. C. 744, 26 S. E. 169, and *Id.*, Appendix, 918, 78 Fed. 387." The two recent cases bearing upon the question under consideration are *Railway Co. v. James*, 161 U. S. 545, 6 Sup. Ct. 621, 40 L. Ed. 802, and *Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081. In the first-mentioned case, Etta James, a citizen of Missouri, brought suit against the St. Louis & San Francisco Railway Company in the United States circuit court of Arkansas for the negligent killing of her husband, while employed as a fireman on one of the defendant's engines, at Monett, a station in Missouri, where her husband resided. The St. Louis & San Francisco Railway Company was organized and incorporated under the laws of the state of Missouri. Thereafter an act was passed by the general assembly of the state of Arkansas which provides: "That before any railroad corporation of any other state or territory shall be permitted to avail itself of the benefits of this act, or any part thereof, such corporation shall file with the secretary of state of this state a certified copy of its articles of incorporation, if incorporated under a general law of such state or territory, or a certified copy of the statute laws of such state or territory incorporating such company, where the charter of such railroad corporation company was granted by special statute of such state; and upon the filing of such articles of incorporation or such charter, with a map and profile of the proposed line and paying the fees prescribed by law for railroad charters, such railroad companies shall, to all intents and purposes, become a railroad corporation of this state, subject to all the laws of the state now in force or hereafter enacted, the same as if formally incorporated in this state, anything in its articles of incorporation or charter to the contrary notwithstanding; and such acts on the part of such corporation shall be conclusive evidence of the intent of such corporation to create and become a domestic corporation." In pursuance of said act, the St. Louis & San Francisco Railway Company filed with the secretary of state of the state of Arkansas a duly certified copy of its articles of incorporation under the laws of Missouri, as required by said act, and has never been otherwise incorporated under the laws of the state

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of Arkansas. The United States circuit court of appeals desired the instruction of the United States supreme court upon the following question: "(2) In view of the provisions of the act of the general assembly of Arkansas approved March 13, 1889, did the St. Louis & San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the secretary of the state of Arkansas, and continuing to operate its railroad through that state, become a citizen of the state of Arkansas, so as to give the circuit court of the United States for the Western district of Arkansas jurisdiction of this action, in which the defendant was in error and is a citizen of the state of Missouri?"

quoting from certain cases, the court says: "To fully reconcile all the expressions used in these cases would be no small task, but we think the following propositions may be deduced from them: There is an indisputable legal presumption that a state corporation, when sued or suing in a circuit court of the United States, is composed of citizens of the state which created it, and hence such a corporation is deemed to come within that provision of the constitution of the United States which confers jurisdiction upon the federal courts in 'controversies between citizens of different states.' It is competent for a railroad corporation organized under the laws of one state, when authorized so to do by the constitution of the state which created it, to accept authority from another state to extend its railroad into such state, and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second state. Such legislation on the part of two or more states is not, in the absence of inhibitory legislation by congress, regarded as within the constitutional prohibition of agreements or compacts between states. Such corporations may be treated by each of the states whose legislative grants they accept as domestic corporations. The presumption that a corporation is composed of citizens of the states which created it accompanies the corporation when it does business in another state, and it may sue or be sued in the federal courts in such other state as a citizen of the state of its original creation. We are asked to extend the doctrine of indisputable citizenship to that, if a corporation of one state, indisputably taken, for the purpose of federal jurisdiction, to be composed of citizens of such state, is authorized by the law of another state to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, that an adopted corporation shall be deemed to be composed of citizens of the second state in such a sense as to confer jurisdiction on the federal courts at the suit of a citizen of the state of its original creation. We are unwilling to sanction such an extension of a doctrine, which, as heretofore established, went to the very verge of judicial power. \* \* \*



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is true that by the subsequent act of 1889, by the proviso to the second section, it was provided that every railroad corporation of any other state, which had theretofore leased or purchased any railroad in Arkansas, should, within sixty days from the passage of the act, file a certified copy of its articles of incorporation or charter with the secretary of state, and shall thereupon become a corporation of Arkansas, anything in its articles of incorporation or charter to the contrary notwithstanding; and it appears that the defendant company did accordingly file a copy of its articles of incorporation with the secretary of state. But, whatever may be the effect of such legislation in the way of subjecting foreign railroad companies to control and regulation by the local laws of Arkansas, we cannot concede that it availed to create an Arkansas corporation out of a foreign corporation in such a sense as to make it a citizen of Arkansas within the meaning of the federal constitution, so as to subject it as such to a suit by a citizen of the state of its origin. In order to bring such an artificial body as a corporation within the spirit and letter of that constitution, as construed by the decisions of this court, it would be necessary to create it out of natural persons whose citizenship of the state creating it could be imputed to the corporation itself."

The facts in the James Case are quite different from those in the case under consideration, and raise a different question. The Revised Statutes of the United States (Supp. 1874-1891, pp. 611, 612) provide: "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature \* \* \* in which there shall be a controversy between citizens of different states. \* \* \* And no civil suit shall be brought before either of the said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." In the James Case, the question was whether the United States circuit court of Arkansas had jurisdiction in the first instance; while in this case the question is whether it was one proper for removal to the United States circuit court from the state court, that unquestionably had concurrent jurisdiction in the first instance, subject to the right of removal in a proper case. Again, in the James Case, the plaintiff did not have the right to proceed under that provision of the statute that suit might be brought in either of said courts in the district of which the plaintiff was an inhabitant (as she was not an inhabitant of Arkansas); whereas the plaintiff herein had a right to sue the Virginia corporation either in the state court or in the United States circuit court of South Carolina. The plaintiff in the James Case would have had no greater right to bring suit

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against the Missouri corporation in the state court of Arkansas than she had to commence her action in the United States circuit court of the last-mentioned state.

In the case of Louisville, N. A. & C. R. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1017, these facts are stated: "This was a bill in equity, filed August 9, 1890, in the circuit court of the United States for the district of Kentucky, by the Louisville, New Albany & Chicago Railway Company, described as a 'corporation duly organized and existing under the laws of the state of Indiana,' against the Ohio Valley Improvement & Contract Company, Richmond, Nicholasville, Irvine & Beattyville Railway Company, and the Louisville Trust Company, all corporations of the state of Kentucky, and other citizens of Kentucky of New York, and of Illinois, for the cancellation of a contract between the New Albany Company and the Construction Company, of a guaranty indorsed by the New Albany Company in accordance with that contract, of bonds issued by the Beattyville Company and held by other defendants, and for an injunction against suits thereon. A plea to the jurisdiction, asserting that the plaintiff was a corporation and a citizen of Kentucky, was overruled. In disposing of the appeal to the United States supreme court Mr. Justice Gray says: "The plaintiff, the Louisville, New Albany & Chicago Railway Company, undoubtedly became a corporation of the state of Indiana in 1873 by its incorporation according to the general statute of 1865 of that state. Whether it afterwards became a corporation of the state of Kentucky also was strongly contested at the bar, and depended upon the legal effect of the statute of Kentucky of 1873."

\* \* \* This court has often recognized that a corporation of one state may be made a corporation of another state by the legislature of that state, in regard to property and within its territorial jurisdiction. Railroad Co. v. Whelan, 1 Black, 286, 297, 17 L. Ed. 130; Railroad Co. v. Harris, 13 Wall. 65, 82, 20 L. Ed. 354; Railway Co. v. Whitton, 13 Wall. 270, 283, 20 L. Ed. 571; Railroad Co. v. Vance, 96 U. S. 450, 457, 24 L. Ed. 752; Memphis & C. R. Co. v. Alabama, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518; Claiborne v. Barnard, 108 U. S. 436, 451, 452, 2 Sup. Ct. 878, 27 L. Ed. 780; Stone v. Trust Co., 116 U. S. 307, 334, 6 Sup. Ct. 388, 1191, 29 L. Ed. 631; Graham v. Railroad Co., 118 U. S. 161, 169, 6 Sup. Ct. 1009, 30 L. Ed. 196; Gerling v. Railroad Co., 151 U. S. 673, 677, 14 Sup. Ct. 533, 38 L. Ed. 311. In this court has repeatedly said that, in order to make a corporation already in existence under the laws of one state a corporation of another state, 'the language used must import creation or adoption in such form as to confer the powers usually exercised over corporations by the state or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an ex-

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corporation, without more, does not do this.' *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 296, 6 Sup. Ct. 1094, 30 L. Ed. 83; *Goodlett v. Railroad Co.*, 122 U. S. 391, 405, 408, 7 Sup. Ct. 1254, 30 L. Ed. 1230; *Railway Co. v. James*, 161 U. S. 545, 561, 16 Sup. Ct. 621, 40 L. Ed. 802. The acts done by the Louisville, New Albany & Chicago Railway Company under the statutes of Kentucky, while affording ample evidence that it had accepted the grants thereby made, can hardly affect the question whether the terms of those statutes were sufficient to make the company a corporation of Kentucky. But a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this court to be required for the disposition of this case either as to the jurisdiction or as to the merits. As to the jurisdiction, it being clear that the plaintiff was first created a corporation of the state of Indiana, even if it was afterwards created a corporation of the state of Kentucky also, it was and remained, for the purposes of the jurisdiction of the courts of the United States, a citizen of Indiana, the state by which it was originally created. It could neither have brought a suit as a corporation of both states against a corporation or other citizens of either state, nor could it have sued or been sued as a corporation of Kentucky in any court of the United States. *Railroad Co. v. Wheeler*, 1 Black, 286, 17 L. Ed. 130; *Railway Co. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; *Railroad Co. v. Steele*, 167 U. S. 659, 663, 17 Sup. Ct. 925, 42 L. Ed. 315; *Steamship Co. v. Kane*, 170 U. S. 100, 106, 18 Sup. Ct. 526, 42 L. Ed. 964." The language of Mr. Justice Gray, when he says: "But a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this court to be required for the disposition of this case, either as to the jurisdiction or as to the merits,"—is made clear in the light of the authorities. In Black's *Dillon on Removal of Causes* (section 101) it is said: "If a corporation already enjoying corporate existence under the laws of one state receives also a charter from another state, it becomes, for purposes of jurisdiction, a citizen of each of those states. When it appears as plaintiff or defendant in the courts of either of these states or in the federal courts sitting therein, in its capacity as a corporation of that state, it is regarded as a citizen of that state alone, and it cannot either invoke or deny the federal jurisdiction on the grounds of its being a citizen of the other state. For a while a corporation may be a citizen of two or more states, according to the forum in which it appears, or the origin of the cause of action, yet it cannot be at the same time, and for the purposes of jurisdiction in one and the same suit, a citizen of two or more states. 'It has no legal existence in either state except by the law of the state; and neither state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be com-

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posed of and represent, under the corporate name, the same natural persons. But the legal entity or person which exists by force of law, can have no existence beyond the limits of the state or sovereignty which brings it into life and endows it with its faculties and powers.' At this day it must be regarded as settled beyond doubt or controversy that two states of the Union cannot, by their joint action, create a corporation which will be regarded as a single corporate entity, for jurisdictional purposes a citizen of each state which joined in creating it. One state may create a corporation of a given name, and the legislature of an adjoining state may decide that the same legal entity shall be or become a corporation of that state as well, and shall be entitled to exercise within its borders, by the same board of directors and officers, all of the corporate functions. Nevertheless, the result of such legislation is not to create a single corporation, but two corporations of the same name, having a different paternity. It follows that when a corporation is chartered by two states, it is as to all its doings in each of those states, and to all claims and liabilities accruing against it there, a citizen of that state, and if it is sued in the courts of that state by a citizen thereof, it cannot remove the cause to the federal court on the ground of its citizenship in the other state." The text is amply sustained by the authorities cited in the footnotes to this section, as well as by those discussed in the James Case and in the case of Debnam v. Southern Bell Telephone Co., 36 S. 269.

In the case of Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081, the court, we think, decided correctly that the Indiana corporation had the right to bring an action in the United States circuit court of Kentucky against a citizen of Kentucky, even though there was a corporation created under the laws of Kentucky with the same name, same corporators, and for the same purposes as the Indiana corporation; thus recognizing, as we have hereinbefore stated, that the two corporations are separate entities. It must be remembered that the Southern Railway Company is not sued as a corporation of Virginia, but the allegations of the complaint are that the defendant is a corporation duly authorized under the laws of the state of South Carolina to operate a general railroad business in that state,—an entirely different entity from the Virginia corporation. If, as it is alleged in the complaint, the defendant is a corporation of the state of South Carolina, then there is an indisputable legal presumption that it is composed of citizens of the state which created it, and therefore it cannot be shown that it is composed of a citizen or citizens of the state of Virginia.

In commenting on the following case, the court, in *Railroad Co. v. James*, says: "*Marshall v. Railroad Co.*, 16 How. 314 L. Ed. 953, was a case tried in the circuit court of

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United States for the district of Maryland, wherein the plaintiff alleged that he was a citizen of the state of Virginia, and that the Baltimore & Ohio Railroad Company, the defendant, was a body corporate by an act of the general assembly of Maryland; and it was suggested, when the case came into this court, that such an averment was insufficient to show jurisdiction in the courts of the United States over the suits, and it was denied that the decision in *Railroad Co. v. Letson*, 2 How. 497, 11 L. Ed. 353, sanctioned it; or, if some of the doctrines there advanced seemed to do so, it was said that they were extrajudicial, and therefore not authoritative. Several judges dissented; but the court, speaking through Mr. Justice Grier, held that: 'If the declaration set forth facts from which the citizenship of the parties may be presumed or legally inferred, it is sufficient. The presumption arising from the habitat of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it, the allegation that "the defendants are a body corporate by the act of the general assembly of Maryland" is a sufficient averment that the real defendants are citizens of that state.'

As the plaintiff and the corporation against which he has brought his action are citizens of the same state, there is no question of diverse citizenship, and no federal question is involved.

Section 8, art. 9, Const., is as follows: "Sec. 8. The general assembly shall not grant to any foreign corporation or association a license to build, operate or lease any railroad in this state; but in all cases where a railroad is to be built or operated, or is now being operated, in this state, and the same shall be partly in this state and partly in another state or in other states, the owners or projectors thereof shall first become incorporated under the laws of this state; nor shall any foreign corporation or association lease or operate any railroad in this state, or purchase the same or any interest therein. Consolidation of any railroad lines and corporations in this state with others shall be allowed only where the consolidated company shall become a domestic corporation of this state. No general or special law shall ever be passed for the benefit of any foreign corporation operating a railroad under an existing license of this state or under any existing lease, and no grant of any right or privilege and no exemption from any burden shall be made to any such foreign corporation except upon the condition that the owners or stockholders thereof shall first organize a corporation in this state under the laws thereof, and shall thereafter operate and manage the same and the business thereof under said domestic charter." Under this section a foreign corporation is expressly and emphatically prohibited from operating a railroad in this state. But the constitution provides that a foreign corporation, after



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it has first been created a domestic corporation under laws of this state, shall have the right to operate a rail in this state. The framers of the constitution, as foreseeing the complication that might arise unless clearly expressed how a foreign corporation was to be cre a domestic corporation, and as if to prevent a foreign corp tion from contending at one time that it was a domestic poration and at another time that it was not, wisely prov the manner in which it could become a domestic corpora In order that a foreign corporation might become a dom corporation, and exercise the rights and privileges herei fore mentioned, it was necessary that the "*owners or s holders* thereof should first organize a corporation in state, under the laws thereof, and should thereafter op and manage the same and the business thereof under domestic charter." (*Italics ours.*) The intention wa meet the requirements of the laws of the United States ferring upon the plaintiff the right to have the case tri the state court. In the agreed statement of facts it admitted that the Southern Railway Company, on the of June, 1894, became a corporation under the laws of state of Virginia; that said Southern Railway Company complied with the constitution (article 9, § 8) and with acts of assembly of said state, in reference to foreign corp tions doing business in this state by filing with the secre of state a certified copy of its charter. If the Southern way Company has complied with the requirements of constitution, then it is in every respect a domestic corporat and was not entitled to the removal. In the case of *State v. Tompkins*, 48 S. C. 49, 25 S. E. 982, the court construed "act to provide the manner in which railroad corporat incorporated under the laws of other states or countries may come incorporated in this state" (22 St. at Large, p. 114), held that "under the third section of said act a foreign poration complying with the provisions of said act ipso f becomes a domestic corporation, enjoying the rights and ject to the liabilities of domestic corporations, 'as fully it were originally created under the laws of this state.' " this is a correct statement of the law, it necessarily foll that the case herein was not removable, and if it is not a rect statement of the law the case of *State v. Tompkins* sh be overruled. The right of the Southern Railway Comp to the removal is not to be determined by the act of in poration alone, but likewise by the provisions of the consti tion, which are to be construed in connection with the When so construed, it will be seen that the defendant is every respect a domestic corporation.

In this connection the language of the court in *Debnar Telephone Co.* (N. C.) 36 S. E. 269, is appropriate, to "Having thus decided that the act in question does license, or pretend to license, but in legal intention and of

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creates a domestic corporation, we come to the final question, —whether a corporation so domesticated can remove an action into the federal courts solely by virtue of its prior incorporation by some other state. In the case at bar the defendant voluntarily took advantage of the act and became a domestic corporation, certainly as far as that act could make it so. It held itself out to the people of North Carolina as a domestic corporation in order to obtain their business, and at the same time evade the penalties attached to the transaction of any business by a foreign corporation, after all comity had been withdrawn by legislative authority. The plaintiff had sued the defendant as a domestic corporation of this state, and in that capacity only, and states a cause of action that presents no element whatsoever of a federal question. He simply seeks to recover damages for personal injuries inflicted upon him by the defendant's servants, who dropped an iron bar upon his head while he was walking the public streets of an incorporated city. Admitting that the defendant exists in a dual capacity as a corporation under the laws of New York as well as of North Carolina, the plaintiff elected to sue it in the latter capacity. In fact, we do not see how he could well have sued it in any other capacity. Forbidden by law to do any business as a foreign corporation, and holding itself out as a domestic corporation, was not the plaintiff forced to presume that he was injured by the defendant in the transaction of its business as a domestic corporation? Is it not a legal presumption that the defendant was acting in the capacity in which alone it could lawfully transact any business?" We do not see how any other conclusion can be reached than that this case is not one for removal, unless the United States supreme court has repudiated the doctrine enunciated in section 101 of Black's Dillon on Removal of Causes, which is affirmed in cases cited with approval by that court in the cases of Railway Co. v. James and Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., hereinbefore mentioned. The question whether the defendant is a corporation of South Carolina, as alleged in the complaint, is to be determined by the state court, and has already been decided in the affirmative at the instance of the Southern Railway Company. But, even if it should decide that the defendant is not a corporation created under the laws of South Carolina, it would not order the case removed to the United States circuit court, but dismiss the action by reason of the failure of the plaintiff to sustain the allegation of the complaint that the defendant is a corporation of this state.

The judgment of this court should be that the judgment of the circuit court be affirmed.

POPE, J., concurs.

TOWNSEND, Circuit Judge. As defendant admits complying with constitution and act of legislature in agreed statement, I concur.

## WILSON v. SOUTHERN RY. CO.

*(Supreme Court of South Carolina, May 6, 1902.)*

[41 S. E. Rep. 971.]

**Foreign Corporations—Removal of Causes.\***

A railroad company incorporated under the laws of another state, a nonresident of South Carolina for the purposes of removal of to a federal court, though it has complied with the requirements of March 19, 1896, providing that thereupon such corporation become a domestic corporation, with all the rights and liabilities thereof.

GARY, A. J., POPE, J., and TOWNSEND, Circuit Judge, dissenting.

Petition for rehearing granted. Affirmed.

For former opinion, see 36 S. E. 701.

JONES, J. For reasons stated in an opinion prepared for me in the case of Calvert v. Railway Co., 41 S. E. 963, which was heard with this case, and stated also in an opinion in the case of Calvert v. Railway Co., 41 S. E. 963, I concur in this case, and reported herewith, on its original hearing, I think the circuit court committed reversible error in refusing to remove the cause to the federal court, and in proceeding to try the trial. Under this view, the other questions presented by the exceptions do not properly arise and need not be considered.

Judgment reversed.

McIVER, C. J., and ALDRICH, Circuit Judge, concurring.

WATTS, Circuit Judge (concurring). The question presented being a federal question, the state court is bound to follow the decision thereon by the United States supreme court or the tribunal invested with power to finally determine such questions; and under my construction of the decisions of the court in the case of Railway Co. v. James, 161 U. S. 581, 16 Sup. Ct. 621, 40 L. Ed. 802, and Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081, and other cases quoted by Mr. Associate Justice JONES in his opinion in Calvert v. Railway Co., supra, I do not do otherwise than concur in the opinion of Mr. Justice JONES. At the same time, I concur in so much of the opinion of Mr. Justice GARY which states that we are either to follow the principles announced by our supreme court in State v. Thompson, 48 S. C. 49, 25 S. E. 982, or it is to be overruled. My opinion is that these opinions of the court supra will have the effect of overruling the Thompson case, and that case will necessarily be overruled when properly brought before the court.

GARY, A. J. (dissenting). This is an action by the administrator of the estate of Noah Y. Wilson, deceased, a citizen of Lexington county, state of South Carolina, for damages resulting from the alleged negligent killing of the deceased by the

\*See preceding case and foot-note.

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defendant, at Winnsboro, S. C., a station on the railroad of the defendant, and resulted in a judgment in favor of the plaintiff for \$4,500. The corporate existence of the defendant is thus alleged in the complaint: "(2) That the defendant, the Southern Railway Company, is a corporation created and existing under the laws of this state, and was at the time hereinafter mentioned, controlling and operating, as owner thereof, a railroad known as the Charlotte, Columbia & Augusta Railroad (a corporation duly created under the laws of this state) extending from Charlotte, in the state of North Carolina, through the state of South Carolina to the city of Augusta, in the state of Georgia, and having stations along said railroad in the county of Fairfield, in the state of South Carolina, for the transaction of business; and also has, in the city of Columbia, S. C., offices where it transacts and manages its business; and the defendant owned and operated, and now owns and operates, the locomotives, cars, and other appurtenances of said railroad." The complaint also alleges that the defendant violated the ordinance of the town of Winnsboro making it a misdemeanor "for any person or persons to run, or cause to be run, any train of cars through the town of Winnsboro at a greater rate of speed than six (6) miles per hour."

The defendant answered the complaint as follows: "For the first defense: (1) Denies each and every allegation therein contained except so much thereof as is hereinafter admitted. (2) Alleges that it is, and was at the time of the commencement of this action and at the times hereinafter mentioned, a corporation duly chartered and organized under and by the laws of the state of Virginia, and a citizen thereof, with authority, under its charter, to purchase and lease railroads, both inside and outside the state of Virginia. (3) That on or about the 10th day of July, 1894, the defendant purchased the Charlotte, Columbia & Augusta Railroad, at a foreclosure sale under decree of foreclosure and sale rendered in a suit in the United States circuit court for the Fourth circuit in the district of South Carolina, upon a mortgage made by said the Charlotte, Columbia & Augusta Railroad Company of said railroad; that said Charlotte, Columbia & Augusta Railroad was a line of railway extending from the city of Charlotte, in the state of North Carolina, through the state of South Carolina to the city of Augusta, in the state of Georgia, and a connecting link in a through line of railway owned, controlled, and operated by defendant, having termini in different states, and as such constituted part of the machinery whereby defendant carried commerce between the state; and said railroad is now owned, controlled, and operated by defendant as one of the connecting links in the said through line of railway of this defendant company. (4) That among the laws of the state of South Carolina, under and by virtue of which defendant purchased and is now operating the afore-



said railroad in the state of South Carolina, is an act of the general assembly of said state entitled 'An act to declare the terms on which foreign corporations may carry on business and own property in the state of South Carolina,' approved December 20, 1893 (21 St. at Large, p. 409), and defendant alleges that on the — day of July, 1894, it fully complied with the terms and conditions of said act, and has since said act so complied. (5) That on the — day of January, 1895, defendant did file in the office of the secretary of state of the state of South Carolina a copy of its charter, authenticated in the manner directed by law for the authentication of the minutes of the state of Virginia, under whose laws it was chartered and organized, and did further, prior to the — day of January, 1899, and prior to the alleged injury to the plaintiff's intestate, cause a copy of said charter to be recorded in the office of the register of mesne conveyances in the counties of said state in which it was carrying on its business; that said act was done in compliance with the act of the general assembly of the state of South Carolina, entitled 'An act to provide the manner in which railroad companies, incorporated under the laws of other states or countries, may become incorporated in this state,' approved March 19, 1896; but defendant alleges that by such acts it did not deprive itself of the right as a citizen of the state of Virginia to remove causes and actions brought against it by the citizens of South Carolina in the courts of this state to the United States circuit courts sitting in this state under the act of congress in such case made and provided, nor did such acts done by it deprive such federal courts of the jurisdiction to hear and determine such causes when removed." The answer also set up as a second defense that the plaintiff's intestate was a trespasser, and was guilty of contributory negligence.

After hearing argument on defendant's petition for removal on the ground of diverse citizenship, his honor the presiding judge granted the following order: "A petition and bond for the removal of this case to the circuit court of the United States for the district of South Carolina was duly filed in this court by the defendant, and its counsel now present the petition and bond, and asks the court to accept said petition and bond, and proceed no further with this suit, except to pass an order to remove the record into the United States court. I am of the opinion that by compliance with the act of the general assembly of South Carolina approved March 9, 1896, the defendant has become a citizen of this state, and hence there is no diverse citizenship to entitle defendant to an order of removal. The motion for such removal be refused, and it is so ordered."

The defendant immediately served notice of appeal from the exceptions on the plaintiff. The record contains the following statement of facts: "After the service of said notice of appeal, the case was called for trial. The defendant ob-



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to proceeding to trial, on the ground that the court had no jurisdiction. It further objected to proceeding with the trial of the case upon the ground that the notice of appeal which had been served operated as a supersedeas, and that, until such appeal should be heard, the court could not proceed with the trial. Both objections were overruled, and the presiding judge ordered, against such objections of the defendant, the case to proceed to trial and, thereupon a jury was impaneled to try the cause. The plaintiff introduced testimony tending to maintain and prove the allegations of his complaint. The defendant introduced testimony tending to disprove the allegations of the complaint, and to maintain and prove the defenses set up in its answer."

The defendant appealed upon the following exceptions: "To the order refusing to remove cause: (1) Excepts because the presiding judge erred, as a matter of law, in holding that defendant, by complying with the act of March 9, 1896, of the state of South Carolina, in filing its charter in the secretary of state's office, became a corporation and a citizen of the state of South Carolina, and hence could not remove the said case to the federal court. (2) Excepts because the presiding judge erred, as a matter of law, in not deciding that, notwithstanding such compliance with the act, the defendant, for purposes of jurisdiction in the federal courts, still remained a citizen of the state of Virginia, and upon the face of the record was entitled to an order of removal. (3) Because the presiding judge erred, as a matter of law, in refusing to accept said petition and bond, and proceed no further in said suit." "To the ruling compelling defendant to proceed to trial: (4) Excepts because the presiding judge erred, as a matter of law, in ordering, against the protest of defendant, the said case to proceed to trial in said court, and in proceeding to try said case, against the objection of the defendant to the jurisdiction of said court. (5) Excepts because the presiding judge erred, as a matter of law, in holding that the notice of appeal served upon plaintiff did not operate as a supersedeas to stay all further proceedings in said court until said appeal could be heard by the supreme court, and in directing that the said case should proceed to trial, notwithstanding defendant's objection." "To the judgment and ruling of the court: (6) Excepts because the presiding judge erred, as a matter of law, in charging the jury the plaintiff's first request, which was as follows: 'First. That the violation of a statute or a valid municipal ordinance regulating the speed of railroad trains is negligence, and whether such negligence under any given circumstances be gross, or reckless, or willful, is a question for the jury;' whereas he should have charged them that the violation of such statute or ordinance is only a circumstance from which the jury may infer negligence."

This case was heard in connection with the case of Calvert v. Southern Ry. Co. by the supreme court in banc, and as the

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question of removal is involved in both cases, and the sole question in the case of Calvert v. Southern Ry. Co. We have selected that as the case in which to set out at least our views of this court upon that question. What was the result disposed of the questions raised by the exceptions in the case relating to the right to removal.

We proceed to a consideration of the exceptions to the writs compelling the defendant to proceed to trial. In the first place, the facts upon which the defendant made the motion for an order removing the case were not in controversy. The objection urged by it why the state courts should not proceed with the trial of the case were in the nature of a denial of the jurisdiction of the state court, and therefore fall outside the provisions of section 356, Code, the proviso of which is as follows: "Provided, an appeal from a judgment or decree overruling a demurrer shall stay the further hearing of the cause unless the presiding judge shall be satisfied that the ends of justice would be subserved by proceeding with the trial, and shall order the trial of the cause to proceed to judgment." The presiding judge was satisfied that the ends of justice would be subserved by proceeding with the trial and properly ordered the trial of the cause to proceed to judgment. In the second place, the circuit court had jurisdiction of the case at the time of trial, as the return had been filed in the supreme court. In the case of *Manufactory Co. v. Cely*, 40 S. C. 432, 18 S. E. 790, the court, by Mr. Justice McIver, thus states the rule: "As we understand the circuit court, having once acquired jurisdiction of the cause and the parties thereto, retains such jurisdiction until it is lost, and it is not lost until the jurisdiction of this court attaches. Now, as it has always been held that the jurisdiction of this court does not attach until the return required by section 2 has been filed in this court, for the obvious reason that until the return is filed this court has no record upon which it could take jurisdiction of any cause, except such as is specially provided for, either by the constitution, the statutes or the rules of court, and as it is very clear that the present case does not fall within any of those classes, it follows necessarily that this court never acquired jurisdiction of this cause until after the return was filed." It is true, there are exceptions in some of the cases that are not in accord with this doctrine arising from a misconception of the facts in the case of *Calvert v. Stelling*, 32 S. C. 102, 10 S. E. 766, and from decisions rendered before section 356 of the Code was amended. In the last-mentioned case the court says: "While this appeal was pending, and before the court announced its judgment, the case came up before his honor Judge Wallace, who heard the case notwithstanding the pending appeal, which was brought to his attention. \* \* \* From the view which was taken of these cases, we have reached the conclusion that the fifteenth exception must be sustained, which demands

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versal of the judgment below on the ground that at the time the cases were heard below by his honor Judge Wallace, an appeal was then pending in this court, which, in our judgment, deprived the lower court of jurisdiction."

Lastly, we will consider the exception to the judgment and rulings of the court. We do not recall any case in which the exact question raised by the exception has been presented to this court for adjudication. There are several cases in this state deciding that it is negligence per se for a railroad company to fail to comply with the provisions of section 1685, Rev. St., as to ringing the bell or sounding the whistle within a certain distance, when approaching a highway, etc. The ordinance hereinbefore mentioned was dependent for its validity on the act of the legislature granting a charter to the town, and, as the legality of the ordinance is not in controversy, it must be construed to have the same force and effect as an act of the legislature. There is, therefore, no reason why the violation of an ordinance should not constitute negligence per se as effectually as the violation of an act of the legislature. Again, negligence is, in general, a mixed question of law and fact. When, however, the facts are not in controversy, and there is but one inference to be drawn from them, they only present a question of law to be determined by the court, and not by the jury. In this case it does not appear that the facts touching this question were in controversy, nor is there anything in the record showing that they were susceptible of more than one inference. There was, therefore, no error in charging plaintiff's first request. There is still another reason why the exception cannot be sustained. It is not only incumbent on the appellant to show that there was error, but he must also show that he thereby suffered prejudice. There is nothing in the record upon which such fact can be based.

The judgment of this court should be that the judgment of the circuit court be affirmed.

POPE, J., and TOWNSEND, Circuit Judge, dissent.

## CLEGHORN v. WESTERN RY. OF ALABAMA.

(*Supreme Court of Alabama, Nov. 18, 1902.*)

[33 So. Rep. 10.]

## Railroad Company—Frightening Horses—Mail Cranes—Negligence.\*

A railroad company which erects a mail crane in or near a highway, which, from its appearance when a mail bag is hung on it, is calculated to frighten a horse of ordinary gentleness, driven in the highway, and does so, injuring the driver, is liable for negligence.

\*See generally, foot-note appended to *International & G. N. R. Co. v. Locke* (Tex. Civ. App.), 2 R. R. R. 754, 25 Am. & Eng. R. Cas., N. S., 754.

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Appeal from circuit court, Macon county; N. D. D. Judge.

Action by William Cleghorn against the Western Ry. of Alabama. Demurrers to the complaint were sustained and plaintiff appeals. Reversed.

The complaint contained three counts. The first count in words and figures as follows: "Plaintiff claims of defendant the sum of three thousand dollars damages, for heretofore, in the month of August, 1900, defendant corporation operating a railroad in Macon county, Alabama, and that said line of railroad intersected a public road at Franklin, in said county and state, making a public crossing, that on, to wit, the 23d day of August, 1900, plaintiff averse that he was driving a mule hitched to a one-horse wagon to the said crossing, and that when he reached said public crossing, and just as his mule put its front feet between the tracks of the defendant's said line of road on said crossing, his mule became frightened at a mail crane erected by defendant or very near the public crossing, on which crane the United States mail was suspended, and, jerking suddenly back, threw plaintiff violently from the seat in said wagon into a ditch about eight or ten feet deep, over which was a bridge leading up to said crossing; that the mule, continuing to run, ran said wagon off of said bridge, and the mule and wagon ran on plaintiff before he could rise from where he had been violently thrown, severely injuring him, breaking his right leg and three ribs in his right side, besides otherwise injuring him. And plaintiff avers that said mail crane was negligently erected by the defendant on or near the public crossing, and that defendant knew that it was to be used to hang the mail from, and that trains need not stop or slow up in order to receive the United States mail at said station, and that it was so used, and that when the mail was suspended from said crane it was the object calculated to frighten a mule of ordinary gentleness, and plaintiff avers that his mule was a mule of reasonable gentleness. And plaintiff avers that by reason of the negligence of defendant in erecting the said mail crane so near said crossing he was injured as aforesaid, and was compelled to keep his bed for thirteen weeks, and suffered great mental anguish and bodily pain, and is still unable to follow his occupation and to perform any hard labor; and by reason of said injuries he was compelled to incur large doctors' bills, and drug bill, to his special damage \$80. And plaintiff avers that by reason of the negligence of defendant aforesaid he has been damaged in the sum of three thousand dollars, for which he now sues." In the second count the prefatory allegations were the same as in the first count, and the averments of negligence were as follows: "And plaintiff avers that defendant negligently allowed and permitted the said crane to be erected, and to remain at said crossing, knowing that it was to be

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to hang the mail on so that defendant's train could receive the mail without stopping at said station of Franklin, but that it was so used. And plaintiff avers that when the mail was suspended from the said crane it was an object reasonably calculated to frighten a mule of ordinary gentleness, and that his mule was a reasonably gentle mule; and plaintiff avers that on account of the negligence of defendant aforesaid he was damaged," etc. The third count, after containing the same prefatory allegations as alleged in the first count, contained the following averments of negligence: "And plaintiff avers that said bridge was erected by defendant, and that it was defendant's duty to keep said bridge in repair, and plaintiff avers that there were no guard rails on said bridge. And plaintiff avers that defendant negligently erected or permitted the erection of said crane at said crossing, knowing it was to be used to hang the mail on, so that defendant's train need not stop or slow up in order to receive the United States mail at said station of Franklin, and that it was so used; and plaintiff avers that, when the mail was suspended from said crane, it was an object calculated to frighten a mule of ordinary gentleness, and that his mule was a reasonably gentle mule. And plaintiff avers that by reason of the negligence of defendant in erecting or permitting the erection of said crane at said crossing, and the failure of defendant to bar said bridge in reasonably safe condition for public travel, in that it did not have any guard rails on said bridge, his mule ran off of said bridge, and he was severely injured, to his damage aforesaid," etc. The plaintiff amended his complaint by alleging in each count thereof that "his mule was a mule of ordinary gentleness, and that the mail crane, when the mail was hung thereon, was naturally calculated to frighten a mule of ordinary gentleness," and by the further averments "that, by reason of the negligence of defendant in erecting the said mail crane on said crossing with the knowledge aforesaid, he was damaged in the sum above stated." To each count of the complaint as amended the defendant demurred as follows: To the first count, upon the following grounds: "First. It fails to show with sufficient certainty wherein the defendant caused the injury complained of, or that defendant was guilty of any act of negligence which would render it liable in this action. Second. Because it shows that the injury complained of was caused by an act of the plaintiff's mule, and not by the defendant. Third. It fails to show that the said mail crane was, within itself, calculated to frighten an animal of ordinary gentleness. Fourth. It fails to show that the defendant, or any one for whose act it would be responsible, suspended the mail bag which frightened the mule. Fifth. Because it assumes, as a matter of law, that it is negligence to erect a mail crane near a public crossing, when such is not the law." To the second count, on the following grounds: "First. Because it fails to show or aver that it was the defendant's duty not to



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allow or permit said crane to be erected and to remain at the crossing. Second. Because it assumes that the defendant had the right to interfere with the United States government in the erection and control of its mail cranes. Third. Because it fails to show or aver with sufficient certainty that the defendant was charged with the erection and control of the mail crane." To the third count, upon the same grounds assigned to the first and second counts, and also upon the following grounds: "First. Because it is a departure from the original complaint, in this: that it seeks to recover for defect in the bridge, when the original complaint sought recovery for the negligent erection of a mail crane. Second. Because it fails to show or aver that it was defendant's duty to provide guard rails on said bridge. Third. Because the allegation of negligence is in the alternative in this: that it avers that the defendant negligently erected or permitted the erection of said crane." The court sustained the demurrers as interposed by the defendant to the complaint, and the plaintiff declining to plead further, judgment was rendered in favor of the defendant. The plaintiff appeals, and assigns in error the rulings of the court upon the demurrers interposed by the defendant to the complaint.

Oscar S. Lewis, for appellant.

Geo. P. Harrison, for appellee.

McCLELLAN, C. J. Mail cranes at flag stations are necessary to the business of railway companies carrying the mail, but it cannot be said to be necessary for such companies to erect such cranes in or so near to public roads crossing the tracks as that the cranes or their use would obstruct the travel of highways by the public. To the contrary, in such situations, as well as all others, railways must have due regard to the rights of the public in adjacent highways; and if, in such regard, a crane is erected in or so near to a public road that a traveler, without contributing fault on his part, sustains injuries by reason of its location, the railway is liable to him in damages, as it would be for any other unnecessary and wrongful obstruction of the highway. If it may be said that a mail crane is in itself a structure of such ungainly, and say hideous, mien as to be calculated to frighten a horse of ordinary gentleness, and one is erected immediately upon the side of a public road, and such a horse, in being driven, becomes frightened and unmanageable, and hurts his driver, the latter has his action on the case against the railway company. But suppose such crane, so located, in and of itself is not calculated to frighten gentle horses, but becomes an object of terror to them—a scarecrow, or, more accurately, a scarehorse—when a mail bag is suspended upon it, and in conjunction with such bag, and that while the crane is being put to its intended uses a horse of ordinary gentleness is driven along the road, and becomes frightened at the sight and its burden, and runs away, or springs aside or backs

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a ditch, and hurts the driver; in such case can the driver recover against the railway company as upon negligence for erecting and having the crane so near to the highway, contemplating and intending this terrifying use of it? In determining this question, it is to be assumed and borne in mind that damages are not claimed for the act of putting the bag on the crane, and that the bag is in fact strung onto the crane, not by the railway, but presumably by an employee of the postal service. But it is also not to be lost sight of that it is the railway company whose business it is to get that bag at that station and carry it forward; that the postal department of the government is not concerned as to how the carrier gets the bag, but only that the bag is got by it and carried; that the crane is erected by the company to facilitate the accomplishment of a duty and obligation resting on it; and that the government puts the bag on the crane to the end that the railway company may discharge its duty with the greatest ease to itself, by taking the bag on without stopping its train. The question thus presented is one of some nicety and difficulty. It is, moreover, *res integra*, so far as we are advised. Our opinion upon it, however, is that the railway company would be liable. By the erection of the crane for its own purpose of having mail bags strung upon it, the company assumes responsibility for injuries resulting from the structure while and in consequence of its being in the use intended, if it has been guilty of negligence in erecting the crane too near a public road, and the crane, with its burden, is an object calculated to frighten gentle horses. In such case the negligent erection of the crane, in the contemplation and with the intention that it shall be used by others for the benefit of the company in a way which is calculated to frighten domestic animals and cause them to injure their owners, is the efficient and proximate cause of an injury resulting from the position and intended use of the crane. Having in mind the purposes of the erection, and the fact that it will inevitably be put to the intended uses, there is, we think, an unbroken chain of causation from the erection of the crane at the side of a highway, and the fright of a passing horse, produced by the presence there of the crane, with the mail bag upon it. The complaint in this case makes a case, under these views of the law, and the court erred in sustaining the demurrer to it. We may not be impressed with the notion that such a structure, with a mail bag on it, is calculated to disturb the equanimity and frighten a horse of ordinary gentleness; but it is alleged to be in this complaint, and that question is one for the jury.

The judgment for the defendant must be reversed, as also the judgment sustaining the demurrer to the complaint as amended. A judgment will be here entered overruling the demurrer and remanding the cause. Reversed, rendered, and remanded.

## LIVERMON v. ROANOKE &amp; T. R. Co.

*(Supreme Court of North Carolina, Dec. 16, 1903.)*

[42 S. E. Rep. 942.]

**Railroads—Fires—Negligence.\***

For a railroad company to permit its track and right of way to become covered with dead grass and combustible material, to which fire, spreading to property of another, is communicated by sparks from an engine, is at least evidence of negligence.

Appeal from superior court, Bertie county; Brown, J.

Action by A. T. Livermon against the Roanoke & Tarboro Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

This is an action for the recovery of the value of cord wood burned through the negligence of the defendant while it lay up along its track, awaiting shipment. The material points of the complaint are as follows: "(2) That on or about the 28th February, 1899, the plaintiff was the owner of a certain quantity of cord wood, which was of the value of \$200, which had been by him placed in the vicinity of the defendant's line of railway, preparatory to its shipment to be taken by the defendant's trains. (3) That on or about the 28th February, 1900, the defendant, by means of fire negligently permitted to be communicated from its locomotive to the wood, did unlawfully and wrongfully burn the same, to the plaintiff's damage \$200. (4) That defendant on or about the 28th February, 1900, unlawfully and negligently permitted to accumulate on the line of railway, and adjacent to which the plaintiff's said wood was placed for shipment over it, dead grass, and stubble, and other inflammable material, and to which sparks were negligently permitted to be communicated from its locomotive to inflammable material, grass and stubble, etc., hereinbefore mentioned, and thereby communicated fire to the said wood, and by which the same was totally destroyed, and to his damage \$200." The answer denies every allegation in the complaint, and then proceeds as follows: "(5) That some cord wood was placed near defendant's track in the fall of the year 1899, or the following winter. (6) That the said cord wood was placed on defendant's right of way near its track by plaintiff, then said plaintiff negligently contributed to his own injury, in that he placed said wood near defendant's track without the permission of this defendant, and nearer to its track than a man of ordinary prudence and care would place it, and too near to defendant's passing engines and locomotives to be safe from fire, and nearer to the track than the defendant's rules allow; that the defendant directed the plaintiff to remove said wood, and offered to furnish a car for

\*See foot-note appended to *Crissey & Fowler Lumber Co. v. R. G. R. Co.* (Colo.), 2 R. R. R. 412, 25 Am. & Eng. R. Cas. 412.



ment of same in order to get it away, notwithstanding it had never given the plaintiff authority to place it there, but plaintiff refused to allow it to be shipped, and failed to remove it, but, on the contrary, allowed it to remain at the place it was until it became dry and easy to ignite, and, if the same was burned, it was without the fault or negligence of this defendant; and such contributory negligence the defendant especially pleads and sets up in bar of any recovery in this action." The jury found that the wood was burned by the negligence of the defendant, and that the plaintiff did not contribute by his negligence to his own injury. There was competent evidence tending to sustain these findings. Among other evidence, there was testimony to the effect that the defendant's right of way was covered with dead grass and other inflammable material adjacent to the wood; that the fire was first seen on said right of way, about a foot from the cross-ties and 10 feet from the wood, about a minute or so after the passage of one of the defendant's trains; that the wood was piled on the right of way, 9 feet from the track, by permission of the defendant, for the purpose of shipment; that the wood remained there from August and September, 1899 to the 28th February following, when it was burned; that the reason for the wood remaining there so long was the refusal of the defendant to ship any of the wood until there was a trainload ready for shipment; and that it was the custom of the defendant to permit wood to be so piled for shipment.

The following is the entire evidence for the defendant:

"Pruden, conductor of the railroad, testified that plaintiff's wood was placed only 4 or 5 feet from the end of the cross-ties. Have seen other wood along right of way, but further off from the track. Cross-Examination: Wood is generally placed not closer than six feet. In fact, the rule of the company requires all wood to be placed not nearer than six feet from the cross-ties. I never measured distance of wood from ties; only saw it.

"L. C. Hedgepeth testified: I was notified to remove this wood; that the section master wanted to put in a switch there. I stated that I did not own the wood, but I repeated to plaintiff that company wanted this wood removed; that they desired to put in a siding there. I did not repeat it to plaintiff at the request of any one, but of my own motion. A negro delivered me the message. I don't know who sent him."

Judgment for plaintiff. Appeal by defendant.

St. Leon Scull, for appellant.

DOUGLAS, J. (after stating the case). At the close of the plaintiff's evidence, the defendant moved for a judgment as of nonsuit. This was properly refused. Permitting its track and right of way to become covered with dead grass and combustible material was at least evidence of negligence. The defendant, after introducing evidence, offered various

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prayers for instructions, among which were the following:—  
“(9) Upon the whole evidence, the plaintiff cannot recover.”  
“(10) Upon the whole evidence, the defendant is not guilty of negligence, and the plaintiff cannot recover.” In view of the substantial evidence tending to prove negligence, these prayers were manifestly improper, and would have been so in any event. Where there is no evidence tending to prove negligence, or nothing more than a mere scintilla, the court should so instruct the jury; but in all such cases the evidence should be construed most strongly against the party asking for such a direction of the verdict, as it is practically a demurrer to the evidence. All contradictions must be solved in favor of the opposite party, taking his evidence as true, and construing all the evidence in the light most favorable to him. *Cowley v. McNeill*, 125 N. C. 385, 34 S. E. 499; *Coley v. Raleigh & Co.*, 129 N. C. 407, 40 S. E. 195, 23 Am. & Eng. R. R. N. S., 885, and cases there cited. The form of the prayer is itself objectionable, as it assumes that equal weight is to be given to all the evidence. The prayer should be substantially to the effect that there is no evidence tending to prove the negligence of the defendant or the plaintiff, as the case may be. A mere scintilla is not considered evidence.

Two of the defendant's prayers were given, as follows:—  
“(1) If the jury shall find from the evidence that the plaintiff piled or raked up the wood on defendant's right of way, near the track, without obtaining consent of defendant, and in that event the plaintiff assumed all risk of fire from defendant's engine, and plaintiff cannot recover.” “(8) If the plaintiff must go further, and show more than that the right of way was not clear of stubble, etc., but must also show to the satisfaction of the jury that the fire originated from defendant's engine, before plaintiff can be allowed to recover.” The court further charged the jury as follows, to which the defendant excepted: “(1) If the jury find that the wood was placed on the right of way by consent of defendant for firewood, and that along that section of the road the track and right of way were foul and littered with inflammable material, and that sparks were communicated from defendant's engine to this inflammable material, and that such fire started and extended to plaintiff's wood and destroyed it, you will answer the first issue, ‘Yes.’ (2) If you find that defendant had a rule and regulation prohibiting the placing of wood, or other material, on right of way, within six feet of said roadbed, and that plaintiff did place his wood within six feet of said roadbed, that would be negligence on the part of plaintiff; and if you further find that the sparks from the engine were communicated directly from the engine to this wood by reason of dangerous proximity, it would be contributory negligence on the part of plaintiff, and you will answer the second issue, ‘Yes.’ ” We see no error in these instructions of which the defendant can complain. In fact it might well be questioned whether the second



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is not too favorable to the defendant, inasmuch as it holds the plaintiff to the observance of a rule which does not appear to have been brought to his knowledge. We think that these instructions, with the prayers given, fairly and sufficiently present the defendant's case. The remaining prayers were properly refused.

There are many exceptions to the evidence, none of which can be sustained. It was proper and necessary for the plaintiff to show that the wood was placed on defendant's right of way with its permission, for the purpose of shipment, and that it was not close enough to the track to interfere in any way with the passage of a train.

In the absence of error, the judgment must be affirmed.

## LOUISVILLE &amp; N. R. CO. v. CROAN.

(Court of Appeals of Kentucky, Oct. 29, 1902.)

[70 S. W. Rep. 47.]

## Personal Injuries—Damages—Appeal.

The serious character of personal injuries seeming to justify on the ground of compensation alone the damages awarded, and it being a case authorizing punitive damages, passion and prejudice will not be considered to have entered into the verdict.

Appeal from circuit court, Bullitt county.

"Not to be officially reported."

Action by Ed. Croan against the Louisville & Nashville Railroad Company. Judgment for plaintiff and defendant appeals. Affirmed.

Fairleigh, Straus & Eagles, for appellant.

Chas. Carroll and J. W. Croan, for appellee.

BURNAM, J. The appellee, Ed. Croan, was a passenger on defendant's train which was run into by a freight train whilst standing at Gap in Knob, a station in Bullitt county, on the 23d day of December, 1899, and sought in this proceeding to recover damages for injuries alleged to have been received in consequence thereof. A number of cases which were the outgrowth of this collision have been heretofore considered by this court. See Railroad Co. v. Simpson, 64 S. W. 733; Same v. McClain, 66 S. W. 391; Same v. Richmond, 67 S. W. 25; Same v. Carothers, 65 S. W. 833, 66 S. W. 385,—in which the facts as to the accident have been fully stated, and, it would seem, every question of law settled. The sole ground relied on by the appellant to reverse the judgment of the lower court in this case is that the verdict was so flagrantly against the weight of evidence as to indicate passion and prejudice. The appellee testified, in substance, that he was sitting near the rear door in the coach next to the baggage car, and in consequence of the collision his head struck the window over

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the seat, and his back the edge of the seat; that he had a large basket, filled with fruit, in his lap, and was thrown violently against the edge of the basket; that he received injuries in his neck and back, and that his right testicle and the spermatic cord connecting therewith were seriously injured, and that he suffered continually ever since, and was confined to his bed for three or four weeks. His statements as to the injury to his testicle are very strongly corroborated by the testimony of Drs. Reynolds and Hoffman. Reynolds testified that "he found his right testicle enormously enlarged, tender to the touch, and the spermatic cord three times its natural size, with a tenderness over the right groin; that he also found soreness on the left side of the spine near the shoulder; that the injuries to his testicle were permanent, and appellee would suffer discomfort in walking and standing, and that it was only a matter of time when the intestine would push outward and come through the opening." In the Richmond, Carothers, and McClain Cases, cited supra, it was held that the testimony as to negligence on the part of the appellant was such as to authorize an instruction as to punitive damages; and it seems to us that there was sufficient evidence of the serious character of the injuries received by the plaintiff to have justified the verdict on the ground of compensation alone.

Judgment affirmed.

#### DAVIS v. CENTRAL R. CO. OF NEW JERSEY.

(*Court of Errors and Appeals of New Jersey, June 16, 1902.*)

[52 Atl. Rep. 561.]

#### Railroads—Accident at Crossing—Evidence—Question for Jury.

A light one-horse wagon, in which plaintiff sat, had been driven by another man, over whom the plaintiff had no authority, along a highway, in a southerly direction, over a single-track railroad crossing, when its progress was arrested by the lowering of gates that were designed to guard the crossing on that side. The horse and the wagon and its occupants were thus penned in between the gates, some ten feet in front of the horse, and the track, the nearer rail of which was about 10 feet back of the hind wheels of the wagon. The gates were operated by a man in a tower about 260 feet distant. The plaintiff testified that the driver shouted to the man in the tower to raise the gates. A car came along the highway from the south, and stopped on the west side of the gates. The plaintiff and the driver continued to sit in the wagon. The gates were not raised. After an interval, estimated by the plaintiff at one minute and a half, a train came from the north at the rate of about 30 miles an hour, and the horse, becoming frightened, backed the wagon against the engine, and the plaintiff was injured; *h/d*, that it was for the jury to say whether the plaintiff was negligent in not alighting from the wagon.

(Syllabus by the Court.)

Error to supreme court.

Action by Samuel Davis against the Central Railroad Company of New Jersey. Judgment for plaintiff, and defendant brings error. Affirmed.

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Richard V. Lindabury, for plaintiff in error.  
Edmund Wilson, for defendant in error.

ADAMS, J. The plaintiff, while traveling on a public highway, was hurt by a railroad train. He sued the railroad company to recover compensation for his injury, and obtained a judgment, which is now to be reviewed. The single error alleged on the argument is that the trial judge submitted to the jury the question of contributory negligence. This ruling was correct. The plaintiff, without fault of his own, was suddenly and unexpectedly placed in a predicament. The danger that threatened him was known and imminent. He had a choice of several lines of conduct, and chose one of them. The jury might fairly conclude that he acted with ordinary prudence. This question was for them, and not for the trial judge.

The essential facts of the situation are these: The plaintiff was riding in a light wagon by daylight along Second avenue, in Long Branch. A Mr. Lane was driving the horse. The plaintiff had no control of Mr. Lane, and no responsibility for the management of the horse. Second avenue runs about north and south, and is crossed diagonally by a single track of the defendants' railroad, which runs northeasterly and southwesterly. Each side of this crossing is guarded by gates. The northerly gates are distant about 360 feet from the southerly gates. Other gates guard another street. All these gates are operated by a man in a tower. It does not appear whether the different pairs of gates can be operated separately. Mr. Lane was driving south along Second avenue on the right-hand or west side of the road. The northerly gates were up. He passed them, drove at a slow trot to a point near the track, and walked his horse over the crossing. The plaintiff, who sat on the left side of the wagon, looked along the track in a northeasterly direction, and saw and heard no train. Still going at a walk, the horse approached the southerly gates, which were up. When the horse's head was 8 or 10 feet from the gates they were lowered. This brought the wagon to a standstill, with its hind wheels about 10 feet away from the nearer rail. Up to this point no negligence is imputed to the plaintiff. Both Mr. Lane and the plaintiff shouted to the man in the tower, who was about 260 feet distant from them, and somewhat behind them, to raise the gates. A trolley car came from the south to the other side of the gates, and stopped. The man in the tower did not raise the gates. The plaintiff and Mr. Lane remained sitting in the wagon. A train came from the northeast. The testimony of the engineer as to his time schedule indicates a speed of about 30 miles an hour. The horse got frightened, and backed the wagon against the engine, and the plaintiff was injured.

The element of time is material. The plaintiff was asked: "From the time you stopped at the gate until the train

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came, how long was it?" He answered: "I should say it was a minute and a half." The following excerpts from his testimony afford measures of time: "Q. How long had the horse been standing there before you saw the approach of the trolley car from the south? A. It was on its way when we first stopped. Q. Did you really notice the car at all, coming from that direction? A. Yes. Q. When you first stopped? A. Yes, sir. Q. How long was it then? A. It was pretty well down, towards the End. Q. How far do you say? A. I don't know. Q. A mile? A. Half a mile, perhaps. Q. Did it get to the end before the railroad train got there? A. Just about one minute as near as I can tell. Q. It had stopped before the railroad train got there? A. Just about stopped; it hadn't any farther than stopped. Q. And the gates were down? A. The gates were down. \* \* \* Q. Did this engine ring its bell or blow its whistle? A. No, sir; if it did, I didn't hear it. Q. Did you hear the train approaching just before you were hit? A. Yes, sir; just a minute. Q. How long an interval was it between the time when you heard the roar of the train and the time when you were hit? A. Not over a second or so. Q. From the time you heard the train until you were hit? A. It was not over a second or so, and about the time we saw it we were struck. Q. After you heard the train, did you have any chance to get out of the wagon before you were hit? A. No, sir." It further appears that the plaintiff knew he was in a place of danger; that as he sat in the wagon and its progress had been arrested he looked both ways on the railroad track; that he could see a long distance to the east and west, and that no train was approaching from that quarter and that he could not see far to the northeast. The plaintiff testified that he rang the bell and blew the whistle.

It cannot be said that the length of time between the approach of the trolley car and the accident is precisely fixed. Estimates of the duration of short periods into which much experience is crowded are notoriously inexact, and are apt to be exaggerated. The distance traversed by the trolley car is loosely estimated. There is no proof as to its rate of speed. The fair conclusion seems to be that there was an interval, short but appreciable, between the descent of the gates and the arrival of the trolley car. The plaintiff undoubtedly had time to alight. It is not his fault, and this is the sole criticism of his conduct—that he was negligent in not doing so.

To one who now, at a safe distance, exercises, in the reconstruction of subsequent events, the easy function of review, it seems that several courses of action were open to the plaintiff. It may be observed that he was in a place where injury was almost inevitable. If the horse would stand still, the wagon and its occupants would be safe. The plaintiff testified that he had known the horse for several years, and that he was kind enough to remain in the wagon on the chance that the horse would



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ready was therefore a line of conduct which, if not wholly wise, would not have been irrational. Again, it was surely reasonable to think, at least at the outset, that the man in the power would hear the call upon him, and to expect, or at least hope, that, if he heard it, he would raise the gates. Again, the plaintiff might have jumped off and run away, and left Mr. Lane to get out of trouble as he best could. A man of spirit and self-respect would not be apt to do this, as long as he might be of use to his companion. Again, the plaintiff might have alighted and held the horse's head. Such an intervention, in a moment of peril, by a person with whose presence a horse is not familiar, is apt to irritate the horse and embarrass the driver, if not to injure him who intervenes. A more judicious plan would probably have been for Mr. Lane to hand the reins to the plaintiff, and to go to the horse's head himself.

It is unnecessary to pursue the subject. Enough has been said to indicate the ground of our conclusion. The emergency was sudden, the risk alarming, the best way of escape not obvious. We think that whether the plaintiff acted with common prudence was a fair question for the jury. The judgment is affirmed.

## EUTING v. CHICAGO &amp; N. W. RY. CO.

(Supreme Court of Wisconsin, Nov. 28, 1902.)

[92 N. W. Rep. 358.]

## Torpedoes on Track—Injury to Boy—Evidence.

Whether a torpedo, which had been placed on a railroad track, and which exploded, and injured a boy standing near the track, had been placed there by the fireman for his own amusement, and without the knowledge of the engineer, or by the engineer in whose charge it had been put for safe-keeping and use in emergencies, *held* a question for the jury.

## Same—Same—Scope of Engineer's Employment.\*

An engineer, into whose hands a railroad company has placed torpedoes for safe-keeping and use in emergencies, who puts a torpedo on the track in dangerous proximity to third persons, solely for his own amusement, commits a tort within the scope of his employment, and the company is responsible.

## Same—Same—Liability.

An engineer, who, knowing that a torpedo has been placed on the track in dangerous proximity to third persons, moves his locomotive over it, commits a tort for which the company is responsible.

Appeal from circuit court, Kenosha county; E. B. Belden, judge.

Action by Charles Euting, an infant, by his guardian, against the Chicago & Northwestern Railway Company.

\*See generally, foot-note appended to *Alsever v. Minneapolis & St. R. Co.* (Iowa), 1 R. R. R. 587, 24 Am. & Eng. R. Cas., N. S., 587.



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Judgment on a directed verdict for defendant, and plaintiff appeals. Reversed.

This is an action for personal injuries. Many of the facts are undisputed. It appears that in May, 1899, the defendant company constructed a temporary spur track along one of the streets of the city of Kenosha running into a public park in that city (in which a library building was being constructed) for the purpose of delivering materials for the construction of the building; that the track was not fenced; that on the morning of July 6, 1899, a switch engine operated by an engineer and fireman run over said track into the park for the purpose of pulling a freight car, which had run off the end of the track, back upon the track; that the engine was attached to the car, and made several attempts to pull it; that some boys were standing in the park nearby, watching the operation; that a delayed celebration of the Fourth of July was going on; that the plaintiff was one of the boys thus watching, and that he was about nine years of age; that either the fireman or the engineer descended from the cab of the engine, and placed a railroad torpedo on the track about a foot from one of the driving wheels; that the man who placed the torpedo on the track immediately got into the cab again, and the engine moved over the torpedo, exploding it; and that a piece of metal therefrom buried itself in plaintiff's leg, inflicting a serious injury; and that the plaintiff did not know what it was that the man put upon the track. The engineer testified that he did not place the torpedo on the track; that he did not know it was there, and the fireman testified that he placed the torpedo on the track for his own amusement; that the engineer did not direct him to do so, nor knew that it was done. On the other hand, testimony was given tending to show that the engineer himself placed the torpedo on the track. At the close of the evidence the court directed a verdict for the defendant, and from judgment thereon plaintiff appeals.

Baker & Baker, for appellant.

Edward M. Hyzer, for respondent.

WINSLOW, J. (after stating the facts). The respondent's contention (which seems to have been adopted by the court) is, in brief, that the uncontradicted evidence shows that there was no occasion for the use of the torpedo in the transaction of the defendant's business; that it was placed on the track in the care of the engineer, and the fireman had no authority to take it; that the fireman took it without the knowledge of the engineer, and placed it upon the track for his own amusement; that in so doing he was entirely outside the scope of his employment, and hence that his principal is not responsible for the results of his act. If this contention is fully justified by the facts it is difficult to see how the plaintiff's position could be avoided. We agree with counsel that

dence shows that there was no occasion for the use of the torpedo at this time in the transaction of the defendant's business. It is clear that under the rules of the company it was only to be used as a signal to be put on the track when it was desired to stop an approaching train. We also agree that the evidence shows that it was placed in the care of the engineer, and that the fireman had no right to use it, or authority to take it from the engine, save as directed by the engineer. We cannot, however, admit that the uncontradicted evidence proves that the fireman placed the torpedo on the track without the authority or knowledge of the engineer. It is true that the fireman testifies to this effect, and that the engineer denies that he put the torpedo on the track, or knew of its being placed there, but there is evidence on the part of the plaintiff tending directly to show that the engineer himself placed the torpedo on the track. The nature of the evidence was as follows: The plaintiff and his two companions testified that a man jumped from the cab, placed something on the track, the character of which they did not know, and climbed back into the cab, pulled the lever, and started the engine, when the explosion took place. The engineer testified that the fireman did nothing about the operation of the engine, but that he himself pulled the throttle, and started it. Again, the plaintiff at the trial identified the engineer (both fireman and engineer standing before him) as the man who put the torpedo on the track. We regard this evidence as amply sufficient to carry the question to the jury. So, in considering the motion to direct a verdict, it must be taken as though it were proven that the engineer placed the torpedo on the rail, and moved the engine over it, causing the explosion; and the question is whether a verdict against the defendant could be sustained upon this state of facts. That railroad torpedoes are, in their nature, dangerous agencies, cannot be doubted. It is common knowledge that they are loaded with some high explosive, and with a sufficient amount thereof to cause a loud explosion; and the danger which exists, even in the explosion of toy torpedoes, is too well understood to admit of doubt that railroad torpedoes should be considered as dangerous agencies as matter of law. So the situation to be considered upon the motion is this: The defendant placed these dangerous explosives in the custody of its servant, to be placed on the track in certain contingencies as a warning to approaching trains. The servant, however, placed one on the track when not contemplated by the employer, evidently for his own amusement, and in dangerous proximity to third persons, and moved the engine over it, causing it to explode, and inflict injury on one of such persons; and the question is whether a verdict for the injured person against the principal can be sustained under such circumstances. We think this question must be answered in the affirmative. The principle that a master is not responsible for the torts of his servant when the servant has

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departed from his employment is well understood. The principle here is as easy for application as it is of statement. We should have little difficulty; but, like many another simple and plain principle, its application to construe facts is sometimes very difficult. The question, generally, is whether a servant has departed from his employment, or whether he has departed from or neglected a duty in the line of that employment. In the first case the principal is not responsible for his acts, and in the second case he is. Applying the principle to the present case, supposing that the jury had found that the engineer placed the torpedo on the track, it seems plain that a verdict for the plaintiff might be sustained. The engineer's duty was to operate the engine; to take care of the torpedoes, and see that they were used only at proper times and places. The company had placed in his charge these dangerous agencies, and authorized him to use them at proper times. In placing one of them upon the track as he was doing what the company had directly authorized him to do; but he was not doing it at the time or place authorized by the master. He was not beyond the scope of his employment, but he was willfully or wantonly violating a duty arising from his employment, namely, his duty to safely and properly use the torpedoes. There have been many cases involving the application of this principle, and they can be said to be entirely harmonious; but the principle above stated is believed to be substantiated by the great weight of authority. The doctrine is quite well stated in *Railway v. Shields*, 47 Ohio St. 387, 24 N. E. 658, 8 L. R. A. 464, 10 St. Rep. 840, as follows: "A servant may depart from his employment without making his master liable for his negligence when outside of the employment of his master, so he departs whenever he goes beyond the scope of his employment and engages in affairs of his own, but he cannot depart from the duty intrusted to him when that duty regards the right of others in respect to the employment of dangerous instruments by the master in the prosecution of his business without making the master liable for the consequences. The first step in that direction is a breach of the duty intrusted to him by the master, and his negligence in this regard becomes the negligence of the master." The cases upon this subject will be found quite fully cited in the case of *Euting v. Railroad Co.* (Iowa) 88 N. W. 841, 56 L. R. A. 748. That was a case where an engineer blew off steam from a locomotive solely for the purpose of frightening some children. One of the children, by reason of her fright, fell, and broke her leg, and it was held that a verdict for the plaintiff should be sustained under the principles herein stated.

There is, however, another view which may be taken of the case as made by the plaintiff's evidence, which also leads to the conclusion that it was a proper case for the jury to return a verdict upon. If it be true as the evidence tends to show that

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engineer placed the torpedo on the track, then he knew that a dangerous explosive was on the track immediately in front of the driving wheel at the moment he moved the engine, and that third persons were in close proximity. If, under such circumstances, and with that knowledge, he moved his engine in the attempt to pull the car upon the track, the master would unquestionably be liable for injuries to such third persons which were proximately caused by the engineer's negligent act. Upon the plainest principles, the engineer could not, in prosecuting his master's business, move his engine over an obstacle or dangerous place upon the track which was known to him, when such movement was plainly imminently dangerous to third persons, without rendering his master liable for the proximate result of his negligent act. These views necessitate reversal of the judgment.

Judgment reversed, and action remanded for a new trial.

## SAN ANTONIO TRACTION CO. v. CRAWFORD.

(Court of Civil Appeals of Texas, Dec. 10, 1902.)

[71 S. W. Rep. 306.]

**Practice—Leading Questions.**

Allowing a leading question to be asked as to a matter not questioned in the pleadings or evidence is not prejudicial.

**Carriers of Passengers—Liability for Insults by Servants.\***

A passenger on a street car may recover damages where she is carried past her destination against her will, and thereafter the motorman addresses her in an insulting manner, and shakes his fingers and an iron bar in her face.

**Damages—Excessive.**

One hundred dollars damages is not too great where a passenger on a street car is carried past her destination against her will, and the motorman thereafter addresses her in an insulting manner, and shakes his fist in her face.

Appeal from Bexar county court; R. B. Green, Judge.

Action by Elizabeth D. Crawford against the San Antonio Traction Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Hines & Taliaferro, for appellant.

FLY, J. This suit was instituted by appellee in the justice's court to recover damages in the sum of \$199 sustained, to use the language of the pleading, "by reason of being forcibly carried to and from South Heights to and from a point in or near the center of the city against her will, and the refusal of the conductor and motorman to let her off the car of defendant company at or near her place of destination after repeated

\*As to the liability of carriers to passengers for insults by servants, see note at end of case.



requests so to do, and for the insulting conduct and language of the motorman of said company toward plaintiff. Trial in the justice's court resulted in a judgment for plaintiff in the sum of \$50. On appeal to the county court, plaintiff recovered \$100. The record justifies the conclusion that appellee was a passenger of the street car of appellant, and that on the way from the market house to her home, on South street, although the proper signal was given, the motorman refused to stop the car at South street, and, when requested to let appellee off on Indianola and Goliad streets, refused to do so, and carried her to South Heights, the terminus of the line. On the way back, appellee again signaled for the car to stop at Indianola street and South street, but he refused to stop the car. After taking her to Commerce street, the motorman took her back to South street, where he let her off. Appellee swore that, as appellee got off, the motorman shook the handle, used by him in running the car, in her face, and told her she should never ride on the car again. The witnesses corroborate the testimony of appellee. The motorman admitted that he pointed his finger at her, and carried her by her street because he had a difficulty with her. Appellee swore, also, that the motorman pointed his finger at her and laughed at her.

The first assignment of error complains of the action of the court in permitting appellee to be asked, "Did you have occasion to go from your home at any place in the city of San Antonio on or about the 29th of June, 1901," on the ground that the question was leading. Admitting that the question was leading, we are unable to see how it could have been prejudicial to appellant. It was not questioned in pleadings or evidence that appellee did have occasion to go from her home to the market on the date mentioned, and that she was on appellant's street car.

There is no merit in the second assignment of error, as the issues were properly submitted by the charge of the court.

It is contended by appellant that the judgment should be reversed because the evidence failed to establish any actual damage. We do not think this position well taken. The evidence showed that appellant was a passenger on the street car, and was carried past her destination against her will, and afterwards she was not only addressed in an insulting manner, but had an iron bar or key shaken in her face by an employee of appellant. The proposition cannot be entertained that at any moment that an employee of a common carrier can threaten a passenger, and that the law will give no remedy for such conduct. Speaking on this subject, it is said by Fetter in his work on Carriers of Passengers (section 100): "Where a wrongful act is accompanied by insult, abuse, or oppression, the decided weight of authority is that compensatory damages for mental suffering may be recovered."



there has been no physical injury." In support of the text the following quotation is made from the case of *Chamberlain v. Chandler*, 3 Mason, 242, Fed. Cas. No. 2,575: "It is intimated that all these acts, though wrong in morals, are yet acts which the law does not punish; that, if the person is untouched,—if the acts do not amount to an assault and battery,—they are not to be redressed. The law looks upon them as unworthy of its cognizance. The master is at liberty to inflict the most serious mental sufferings in the most tyrannical manner, and yet, if he withholds a blow, the victim may be crushed by his unkindness. He commits nothing within the range of civil jurisprudence. My opinion is that the law involves no such absurdity. It is rational and just. It gives compensation for mental sufferings occasioned by the acts of wanton injustice equally whether they operate by way of direct or consequential injuries. In each case the contract of the passengers for the voyage is, in substance, violated, and the wrong is to be redressed as a cause for damage." In the case of *Railway Co. v. Jones* (Tex. Civ. App.) 39 S. W. 124, it was held that a female passenger could recover for abusive language used towards her by the wife of a ticket agent. A writ of error was refused by the supreme court. In the *Leach Case*, 33 S. W. 703, the court of civil appeals held: "It is too plain for argument, we think, that a wilful violator of woman's most sacred right of personal security, such as the verdict finds plaintiff in error to have been, though her body be not touched, except by his foul breath and speech, should respond in damages for an outrage to her feelings which proceeds so directly from his concurrent criminal purpose and act." None of the cases cited by appellant contravenes the principles enunciated in the authorities cited. It would be a perversion of law and justice to hold that an employee of a common carrier could shake his finger and a piece of iron in a woman's face, because she wished to be put down on the street for which her contract entitled her to be carried, and that, because she was not actually struck in the face, she could not recover damages. No such doctrine has ever been enunciated in Texas.

There is no merit in the contention that, the moment the car had carried the woman past her street, she lost her character of passenger. The implied contract with the street car company was to carry her to South street and permit her to leave the car, and she was a passenger on the car until that duty was fulfilled.

It is contended by appellant that there was no insult to appellee. The penal law of Texas denounces an assault, whether accompanied by a battery or not, as a violation of its peace and dignity and an invasion of private rights, and we know of few insults that are grosser and more outrageous towards a woman than the shaking of fingers and iron bars in an angry manner in her face. The amount assessed by the jury is not



LOUISVILLE & N. R. CO. *v.* HART.

(Court of Appeals of Kentucky, Dec. 9, 1902.)

[70 S. W. Rep. 830.]

**Railroads—Personal Injuries—Trespassers—Children—Torpedoes—Negligence.\***

Evidence in an action for injuries to an infant, who had gone on a railroad track and unfastened and taken away a torpedo, which he subsequently exploded, examined, and *held* to show that the manner and place of the use of the torpedo by the company was proper, and it was not liable.

Appeal from circuit court, Nelson county.

"Not to be officially reported."

Action by Albert J. Hart, Jr., against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

John S. Kelley and Edward W. Hines, for appellant.

Nat W. Halstead and Morgan Yewell, for appellee.

DURLE, J. The road of appellant railroad company, a short distance from the station of Bardstown, passes over what is, in that neighborhood, called the "little trestle," which is about 180 feet long and 29 feet high at the highest point. Some distance farther away from the station, what is known as the "big trestle" passes over the Bloomfield pike, being about 71 feet high at the highest point, and nearly 600 feet long. Still farther away from the station, the road passes through a long cut, and makes a sharp curve. The ground along this part of the road is very rough and uneven. The right of way is fenced in and protected by barbed-wire fences, and cattle gaps and sign boards are placed conspicuously, warning trespassers. There is no highway except the highway of the railroad, and, while the greater part of this part of the railroad right of way is within the corporate limits of Bardstown, there is no showing that it is used as a passway from one part of the town to another. Everything that could reasonably be expected seems to have been done to prevent people going upon this unusually dangerous part of the right of way. Nevertheless, it appears that—possibly from the very fact that the surface of the ground is broken and irregular, and that there are warnings against trespassing thereon—young people did go there from time to time, and use the right of way as a walk for pleasure. There is no evidence to show that the railroad company consented in any way to this use. On the contrary, all the testimony indicates that the company endeavored to prevent it. In October, 1899, the section boss, having occasion to do some ditching in the cut before mentioned, placed a torpedo on the track between the

\*As to the care due from railroad companies to infant trespassers, see *Savannah, F. & W. Ry. Co. v. Beavers* (Ga.), 21 Am. & Eng. R. Cas., N. S., 646, and foot-note.



trestles, and a signal flag. The torpedo was a flat metallic shell, from an inch and a half to two inches in diameter, charged with explosive, and having flexible arms, to be bent around the top of the T-rail, and to hold it in position until it should be exploded by the impact of the wheels. The object of thus placing the torpedo was to give warning to the engineer of the approaching train in the event the signal flag should fail to attract his attention. These torpedoes, when exploded, made a loud report, like the report of a gun, the object of their construction being to make a noise when exploded. When the section boss and his gang quit work for dinner, they took up the flag and torpedo, replacing them when they returned to work. On the afternoon of the day the two little boys, about eight years of age, went down the road to the Bloomfield pike, went out the pike to the big hill, climbed the hill, and went upon the track, along which they walked to and across the little trestle, when they turned and retraced their steps. On the way back, one of them saw the torpedo, detached it from the rail, and gave it to his companion. They then went back by the same way over which they came, until they were nearly at home, when they were arrested. The boy who had the torpedo went out the pike to the house of some unknown fool whom he met on the pike some distance, and have told him that if he would hit the torpedo with a hatchet, a gold dollar would fly out of it. He then went to his home, procured a hatchet from the kitchen, and, in company with his brother and the appellee, who was a child under ten years of age, pounded the torpedo until it exploded. A quantity of gravel was thrown into the appellees' eye, destroying his sight, and necessitating the removal of the eye. Suit was thereupon brought against the appellant railroad company, and a trial had, resulting in a judgment and verdict for the plaintiff from which this appeal is taken.

It is unnecessary to follow counsel through the various contentions which have been elaborately argued in this case. It is perfectly evident from the testimony that, if there is any place on the road where it is proper to use such a contrivance, it was proper at the point at which it was used. The place was out of the way of ordinary travel, was in itself a dangerous place, and was protected and safeguarded to as great an extent as could possibly be done. There is no question but that the use of such a contrivance was proper at this point, and was proper to use it for the purpose for which it was used on that occasion, viz., to warn the engineer of the expected train when there were workmen upon the track, who might be injured unless the train was stopped. We think, therefore, that it was not negligence to place the torpedo as it is shown to have been placed in the record in this case to have been placed. The use was a proper one. The torpedo was properly in use at the time of its removal from the track. No greater safeguards could have

## Corcoran v. Pennsylvania R. Co

adopted than were adopted. It is therefore readily distinguishable from those cases where explosives were carelessly stored when not in use, and from the turntable cases, where the injury took place when the appliance was left carelessly unsecured when not in use. It is unnecessary, therefore, to consider the argument upon the question whether there was an intervening cause for the accident.

The peremptory instruction should have been given, and the judgment is reversed, and cause remanded, with directions to award appellant a new trial, and for further proceedings consistent herewith.

## CORCORAN v. PENNSYLVANIA R. CO.

(*Supreme Court of Pennsylvania, Oct. 13, 1902.*)

[53 Atl. Rep. 240.]

## Accident at Crossing—Signals—Question for Jury.

In an action to recover for injuries received at a grade crossing, where the evidence was conflicting as to whether a signal was given by the approaching train, the question was for the jury.

## Same—Failure to Look.\*

Where the evidence shows that plaintiff in an action to recover for personal injuries at a railroad crossing stopped his team about 50 feet from the track at a point where his view from the east was shut off by cars standing on an extra track, and that he crossed when he saw a freight train approaching slowly from the west, without looking to the east, and was struck by an express train, which he could have seen 800 feet off if he had looked just before he went on the track, it was proper to direct a verdict for defendant.

Appeal from court of common pleas, Chester county.

Action by John F. Corcoran against the Pennsylvania Railroad Company. Verdict for defendant, and plaintiff appeals. Affirmed.

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, BROWN, and MESTREZAT, JJ.

Thomas W. Pierce, for appellant.

John J. Pinkerton, for appellee.

DEAN, J. Corcoran, the plaintiff, was a truck farmer living near Coatesville, in Chester county, and in carrying on his business had occasion to make almost daily trips from his farm into the town. The farm at one side is bounded by the railroad company's right of way. A lane leads from the farmhouse across the railroad tracks at grade into the town, where at the boundary of the latter, it becomes a street, called "Third Avenue." The street has a rather steep ascent just as it approaches the railroad, and attains the level of the tracks, of which there are two, about 50 feet from them; the north track being for west-bound trains and the south for east-bound. Just east of the crossing there are four tracks.

\*See generally, foot-note appended to New York, etc., R. Co. v. Kistler (Ohio), 4 R. R. R. 340, 27 Am. & Eng. R. Cas., N. S., 340.



The two additional tracks east are used principally for detention of freight trains while passenger trains pass. Corcoran had crossed the railroad with his horse and wagon the town earlier in the morning, had transacted his business and about 10 o'clock was returning home. He drove up avenue until he reached the level of the railroad about 50 yards from the north track. He stopped there; looked and listened. About 200 or 300 yards distant he saw a freight train approaching from the west on the south track. He looked east to see if a train were coming from that direction, but his view was obstructed by box freight cars standing east of the crossing on the extra tracks, and he saw no train coming. He then urged his horse into a faster gait, and, without stopping, attempted to cross the tracks. When he reached the north track, his horse was struck by the Pittsburgh express, a train running west at about 20 miles an hour, and was killed, made no stop at Coatesville. The horse was killed, the wagon destroyed, and the plaintiff seriously injured. He averred that the injury was caused by the negligence of defendant, in that it gave no warning, either by whistle or bell, of its approach to the crossing. Thereupon he brought this suit to recover damages.

At the trial the evidence was very conflicting as to whether warning was given; some witnesses, who had full opportunity to hear, testifying that none was given, while the engineer, fireman, and switchman, as well as other witnesses, testified positively that the locomotive whistle was loudly blown. The learned judge of the court below was of opinion that the evidence of negligence on part of the defendant was insufficient, and, further, that it established contributory negligence on part of the plaintiff. For these reasons he peremptorily instructed the jury to find for defendant. Afterwards, in an opinion filed on motion for a new trial, he concedes that on the question of defendant's negligence the case ought to have gone to the jury, but that the evidence of plaintiff's contributory negligence was clear. He therefore overruled the motion for a new trial, and directed judgment to be entered on the verdict. We now have this appeal by plaintiff.

As to defendant's negligence, although the evidence was contradictory, it was clearly the function of the jury to weigh upon it, and ascertain the truth. The weight of it probably inclined to the side of defendant, for, assuming,—as the court ought to assume, that the witnesses on each side were true to their conflicting statements are reconcilable on the theory that those who testified for plaintiff did not observe the warning because there was no special reason why it should attract their attention. In view of the fact that very many trains approached and passed that point all through the hours of the day, 24, a locomotive whistle was the most common of sounds. To notice that which occurred almost every hour would have been to notice the common and ordinary. It is not im-

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able that those who lived near to, or whose occupations kept them near to, that crossing would not have noticed the blowing of a particular locomotive whistle. But the testimony of those whose duty it was to give the warning, who knew that their own lives and the lives of others depended in some measure on whether they performed their duty, and whose attention would be especially called to the fact of whether they had performed it by the disaster which followed only a few seconds after the warning ought to have been given, was certainly more to be relied on than that of those who had no duty to perform in the matter, whose senses were not on the alert to hear, and who had no special reason to hear, the whistle. But whatever may have been the probabilities as to this fact, the learned judge was right, when, on more deliberate consideration, he concluded that it was a question for the jury.

But was he right on the other point,—that, assuming as a fact defendant's negligence, plaintiff had shown a case of contributory negligence on his part? The plaintiff drove his horse to the top of the ascent from Third avenue, where he was on a level with the railway tracks and 50 feet from them. There he stopped, looked, and listened. That was the place he always had stopped, and usually it was the most suitable place to see the tracks for a long distance both east and west; but at that particular time the view east was shut off by two trains of box cars standing on the extra tracks between the main tracks. It was no fault of his that he could not see through cars, but the fact that they were there greatly increased the peril incident to the crossing. He stopped to "look and listen." The sense of sight was, by reason of the box cars, useless to him at that point. This would dictate to the ordinary prudent man great care, for care exercised must be according to the circumstances. What was the conduct of plaintiff under these circumstances? He says that, after looking, he thought he was all right, and gave his horse a cut with a switch, starting him into a jog trot to cross. When he reached the north track the locomotive struck him. When he stopped to look he could see west that a freight was slowly coming towards the crossing, but at such a distance he was in no danger from that direction. Whether a train, fast or slow, was coming from the east, he did not know, for he could not see. He took the chances of hurriedly trotting across without stopping. Whether increasing his speed would avoid danger would depend on the exact distance a coming train was from him, and its rate of speed, as well as his own. His increased speed might avoid the danger or might run him into it. Prudent drivers, on account of the uncertainty in the calculation generally, avoid the danger by waiting until the expected train has passed. But here the plaintiff did not know whether a train was five or ten minutes distant. He did not know that its schedule was about that time. He did not

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again look, although before actually getting on the first he could have seen it 800 feet off, and could not have run down had he stopped. An adult thoroughly familiar with the movements of trains at a crossing, knowing that about the time for a train coming from the east, drove within 50 feet of the tracks; stops and looks east, but nothing because of a temporary obstruction to seeing in that direction; then rushes across, and is struck by a train coming from the direction where he could not see. If this be a deliberate taking of a great risk, rather than submit to a delay, we do not know what is. It is one which the ordinary prudent man would not take, and there is no other reasonable inference to be drawn from his conduct. It was not according to the circumstances. The plaintiff's own evidence disclosed a case of contributory negligence. The language of the learned judge of the court below, in the concluding paragraph of his opinion on the motion for a new trial, stating the controlling facts with precision: "The plaintiff himself testified that he made but one stop, and when asked, 'You did not look east again after you started?' answered, 'I might have looked that way;' while all the witnesses who testified to the subject say that he looked continuously to the west, so that such was undoubtedly the fact is evident from his conduct directly in front of a train that he must have seen it at some time after passing the baggage room had he looked east." And Justice Fell, in *Muckinhaupt v. Railroad*, 196 Pa. 216, 46 Atl. 365, states the law applicable to these facts: "The whole duty of one about to cross the tracks of a steam road at grade is not in all cases confined to his stopping, looking, and listening for the approach of a train; he must stop at a proper place, and when he proceeds he must continue to look and to observe the precautions which the danger of the situation requires. He should stop at a place where there is another place nearer the tracks from which he could better discern whether there is danger."

The judgment is affirmed.

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NEWMAN v. DELAWARE, L. & W. R. Co.

(*Supreme Court of Pennsylvania, Oct. 13, 1902.*)

[53 Atl. Rep. 345.]

**Railroads—Injuries at Crossing—Question for Jury.**

In an action for injuries at a grade crossing, where there is evidence that plaintiff stopped to look and listen at a proper place, and there is another and a better place for him to stop, and whether he failed so to do, so as to be guilty of contributory negligence, is a question for the jury.

Appeal from court of common pleas, Luzerne county.

Action by Henry C. Newman against the Delaware, L.

wanna & Western Railroad Company. From an order refusing to take off a nonsuit, plaintiff appeals. Reversed.

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, BROWN, and MESTREZAT, JJ.

Paul J. Sherwood, for appellant.

Andrew H. McClintock and Henry W. Palmer (Arthur Hillman, on the brief), for appellee.

MESTREZAT, J. About 8 o'clock in the morning of February 17, 1898, Henry C. Newman, the plaintiff, was driving one horse, hitched to a buckboard, along a country highway in Lackawanna county, and approached a grade crossing of the defendant's double-track railroad. The general direction of the highway was north and south, and the plaintiff was driving south. An automatic electric signal bell stood on the left side or east side of the highway, and from 15 to 30 feet north of the railroad. Painted upon the post of this signal appliance, in large letters, were the words: "Danger while the bell rings." The purpose of this bell was to give notice of a train approaching the crossing from either direction. If in working order, it began to ring when the locomotive was 2,000 feet from the crossing, and continued until the crossing was passed. The plaintiff stopped about 60 or 70 feet from the crossing, and looked and listened for a train. At this point he had an unobstructed view for a long distance to the west, but to the east, or his left, the view was obstructed by a hill which prevented him from seeing the train or engine going west on the west-bound track. The view of the railroad track to the east continues to be obstructed until the person approaching the crossing is within 30 or 35 feet of the crossing, and his horse is 15 or 20 feet from the railroad. On the right or west side of the highway there is a deep ravine, and on that side of the road, for about 50 feet north of the railroad, there is no fence or wall to prevent a frightened or unruly horse from backing a vehicle over the precipice. Under the testimony, the jury would have been warranted in finding that this was a dangerous place for a traveler to stop his team to listen for an approaching train. During the time the plaintiff's team was stopped, a coal train passed the crossing, going west. After it had gone a few hundred feet, and hearing no warning of an approaching train, Newman drove towards the crossing. When his horse was about 15 or 20 feet from the west-bound track, and he and his wagon were opposite the signal bell, he again attempted to stop the horse; but being frightened by the shrill, loud whistle of a light passenger engine approaching from the east at a speed of from 15 to 18 miles an hour, the animal jumped to the right, toward the embankment, and, in the language of the plaintiff, "I pulled her back into the road, and she sprung right across the track, and when she came upon the track this engine going west struck her and killed her." The automatic bell was not

ringing, and no other signal was given of the approach of the locomotive.

The learned trial judge granted a nonsuit on the ground that the plaintiff was guilty of contributory negligence. In his opinion refusing to take off the nonsuit, he says: "I think the plaintiff was clearly guilty of contributory negligence, not in pulling his horse back from the bank, but in voluntarily placing himself in that position, it being one of great danger. His duty was, not to begin to draw up his horse when the latter was within fifteen or twenty feet of the crossing, but to begin that operation soon enough to come to a full stop as soon as or before his horse's head was eighteen feet from the track. It was his duty to stop. Had he done so, the accident would not have happened." It therefore appears that the trial judge held, as a matter of law, the plaintiff was guilty of negligence in not stopping the second time, and at a point nearer the crossing, where he would have had a view of the tracks to the east. We are of opinion that the court was in error in not submitting the question of the plaintiff's negligence to the jury. In his charge, the trial judge says: "The evidence is undisputed that the plaintiff stopped at a point which was usual for travelers to stop, variously estimated as being sixty to one hundred feet away from the crossing." In his opinion he also says: "As he [plaintiff] approached the railroad, he stopped at a point where it was customary for travelers to stop, and variously estimated as being from fifty to one hundred feet from the railroad; the plaintiff's estimate being sixty or seventy feet." As conceded by the court, the testimony conclusively shows that the plaintiff stopped at the usual and customary place at which persons stop when approaching the crossing. This, of itself, prevented the court from deciding, as a matter of law, that the plaintiff was guilty of negligence. *Cookson v. Railway*, 179 Pa. 184, 36 Atl. 194, 6 Am. & Eng. R. Cas., N. S. 100. In that case it was held that: "The usual and customary place of stopping by people when about to cross a railroad at a grade crossing cannot be said, as a matter of law, to be an improper or negligent place. The standard of negligence is that of what persons of ordinary prudence and carefulness would do under the same circumstances, and a general habit of the public to stop in a certain place is persuasive evidence that that place is the right one."

It is contended, however, by the appellee, and was held by the court, that, as the view east was obstructed at the point at which the plaintiff stopped, it was negligence per se for him not to stop again at some point at which he could see a locomotive approaching from the east. The evidence, however, shows that he could not obtain a view of the tracks to the east from where he was at or near the electric signal post, where a view to the west is more or less obstructed. According to the



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mony, he would then be in a position made dangerous by reason of the steep embankment to the west of the highway, and where his horse was likely to be frightened by the sudden appearance of a train or the ringing of the signal bell. This case well illustrates the peril of a traveler stopping a skittish horse at that point. Newman did not drive on the track, but was carried on it by his frightened horse when he was attempting to escape the danger to himself and team by being thrown over the declivity on the west side of the road. The court, therefore, could not declare, as a matter of law, that the plaintiff did not stop at the proper place, or was negligent in not stopping a second time. This was for the jury. In *Whitman v. Railroad Co.*, 156 Pa. 178, 27 Atl. 290, it is said by our Brother Mitchell, speaking for the court: "If notwithstanding the drawbacks of the place where plaintiff stopped, it still had sufficient advantages over other places, to make it the habitual choice of travelers on that road, only a jury can say whether or not it was the best or a proper place to stop, and, even if it was, whether, considering its disadvantages, it was not negligence in the plaintiff not to stop a second time on the level before reaching the track." In *Newhard v. Railroad Co.*, 153 Pa. 417, 26 Atl. 105, 55 Am. & Eng. R. Cas. 358, 19 L. R. A. 563, our Brother Dean says: "There was testimony that plaintiff stopped and listened, and while there was strong evidence that ordinary care demanded he should have stopped at a point nearer the railroad, and there also ascertained whether it was safe to cross, we think the court, under the rule laid down in *Railroad Co. v. Heilerman*, 49 Pa. 60, 88 Am. Dec. 482, followed by a large number of cases since in which the question arose, could not, as a matter of law, determine the fact. If there had been any evidence of negligence on part of defendant, then at just what point the plaintiff should have stopped to look and listen was for the jury to find." It was clearly the duty of the plaintiff to stop, look, and listen at a proper place; and, having observed this duty, he was also required to be especially vigilant and careful as he continued towards the crossing, as his view to the east at the place he had stopped was obstructed. If there was another safe and better place for him to stop, he should have done so. This would have been an exercise of the precaution required of him. But whether there was such a place, and he failed to observe the necessary precaution or carefulness after he had once stopped at the usual and customary place of stopping, was a question for the jury, and not for the court. "The duty of the traveler," says our Brother Mitchell in *Cookson v. Railway Co.*, *supra*, "is therefore not only to keep a vigilant and continuous lookout, but to stop if a second place affords any increased facility to discover impending danger; but whether there is any such place is a question of fact, which is for the jury, if at all in doubt." Again, in *Muckinhaupt v. Railroad Co.*, 196 Pa. 213, 46 Atl.

## Chicago Terminal Transfer Co. v. Kotoski

364, our Brother Fell, citing many authorities in support of the proposition, says: "But whether the place at which he stopped was the proper place at which to stop, and whether there is a second place at which he should stop, are questions of fact for the jury, and not matters of law for the court. The appellee, in support of its position, cites numerous cases, but the facts of these cases clearly distinguish them from the case at bar. The plaintiff did not drive in as an approaching locomotive, nor did he fail to observe the imperative rule which required him to stop, look, and listen for an approaching train. Whether he stopped at the proper place, and thereafter continued to use due vigilance in approaching the crossing, must determine whether he was negligent, and that question is for the jury. The authorities cited by appellee did not authorize the court to determine the question." On another trial of the case, it is suggested that an accurate plan of the locus in quo, showing such distances as can be ascertained by measurements, be furnished the jury. Distances should be omitted. We are not convinced that the photographs in evidence aided the jury in their deliberations. On the contrary, as they appear in the paper book, they are in some respects misleading.

The second assignment of error is sustained, and the judgment is reversed, with a venire de novo.

## CHICAGO TERMINAL TRANSFER CO. v. KOTOSKI.

(*Supreme Court of Illinois, Oct. 25, 1902.*)

[65 N. E. Rep. 350.]

**Appeal—Review.**

The supreme court on appeal will not determine whether the evidence of the testimony justified the verdict of the jury, but only whether there was evidence tending to support the verdict.

**Trespassers—Gross Negligence.\***

Gross negligence, sufficient to show willfulness will entitle a trespasser to recover, even though he be a trespasser.

**Failure to Stop Train after Seeing Persons on Track.**

Where defendant was pushing its train, with the cars in front, over a trestle, over which it knew intended passengers were passing, with intent to enter the train, and it kept a lookout on the back of the car, and he saw the danger of the persons on the trestle and failed to stop the train or signal the persons to run, but made no effort to stop the train or signal the persons, and persons on the trestle were injured thereby, the railroad company was liable.

**Trespassers.**

Whether plaintiff, in passing over a trestle in order to reach the crossing, on which he intended to take passage, after advice by the conductor to use such trestle, was a trespasser thereon, was a question of fact for the jury, and not of law for the court.

**Instructions.**

Where an instruction asked is covered by one already given, refusal is not error.

\*See generally, foot-note appended to *Denver & R. G. R. v. Kotoski* (Colo.), 4 R. R. R. 762, 27 Am. & Eng. R. Cas., N. S., 762.

## Chicago Terminal Transfer Co. v. Kotoski

**Personal Injuries—Evidence.**

In an action for personal injuries, evidence as to the difference of plaintiff's conduct before and since the accident, it being shown that his skull was fractured, was admissible as tending to prove the extent, nature, and probable permanency of his injuries.

**Appeal from appellate court, First district.**

Action by John Kotoski, by his next friend, against the Chicago Terminal Transfer Company. Judgment for plaintiff was affirmed by the appellate court (101 Ill. App. 300), and defendant appeals. Affirmed.

This suit was brought by appellee, by his next friend, to recover damages for an injury to his person through the alleged negligence of appellant's employees. He recovered a judgment in the superior court of Cook county for \$15,000 and costs of suit, to reverse which the defendant appealed to the appellate court for the First district, but that court affirmed the judgment below, and hence this further appeal.

On June 25, 1899, appellee, with others, went as a passenger upon an excursion train of appellant from the city of Chicago to Blue Island, for the purpose of visiting a picnic ground at the latter place. He purchased a ticket to the place of destination and return. Upon reaching Blue Island he, with others, left the train, and upon inquiry of the conductor as to the best way to reach the picnic grounds was told, "Go right straight down the track; you can't miss it,"—pointing down the railroad track, which crossed a narrow bridge or trestle 100 feet long, 25 feet high at its highest point, and a little wider than a train of cars. Appellee had never been to the place before. The conductor also said, "The train leaves at five o'clock sharp, right here." It was then standing at the station, and the rear end about 150 feet north of the north end of the trestle. Appellee and several other of the passengers walked down the track, crossed the trestle, and in about two hours attempted to return by the same route. Before the parties got to the trestle on their return a number of others passed north over the trestle. As appellee and those with him approached it they saw the train standing where they had left it; that is, the rear end about 150 feet north of the north end of the trestle. When they got near the middle of the trestle the train started backing, with the coaches in front, toward them, without ringing the bell, blowing the whistle or giving any other signal. The rate of speed of the train as it backed down was variously estimated by the witnesses at from six to eight miles per hour. As it approached, appellee and others turned and ran back south in order to escape the danger of being run down. There was no room upon the sides of the trestle upon which a person could stand with safety and permit the train to pass, except at one point, where there was room for a single person, but that place was occupied before appellee could reach it. The train finally caught him and a young girl whom he was attempting to assist to escape, and

threw them from the trestle to the ground below. In plaintiff's head struck a timber on the ground, producing a severe fracture of the skull. There was no dispute on trial as to the fact that his injuries are of the most serious character, disabling him permanently, both mentally and physically. The evidence tended to show that a train stood upon the rear platform of the rear car of the train backed over the trestle, who called out to the people on the bridge to run, but gave no signal and made no effort to stop the train.

Upon the trial appellant's section foreman testified that there are signs at both ends of the trestle, "This is a bridge,—foot passengers are prohibited from crossing." Whether these signs were at the ends of the bridge at the time of the accident he does not say, nor is there proof as to the fact except the statement of witnesses that they did not see them on that day. The same witness further testified: "I have had a good many picnics out there in the summer time and have taken them every Sunday; had them in 1898-99. This railroad has had excursions to accommodate the people going to the People, when they got there, some went one way, some went the other. Some went down the street, some over the viaduct. I have seen people crossing that bridge or viaduct. None of the trainmen testified on the trial. Why the train was backed over the trestle in no way appears, nor is it shown that the track south of the station over the trestle is in general use by the company.

Jesse B. Barton, for appellant.

John F. Waters and C. Helmer Johnson, for appellee.

WILKIN, J. The three grounds of reversal here urged may be stated to be: The trial court erred in refusing to give the instruction asked by the defendant at the close of all the evidence to find for the defendant, in refusing instruction by it upon the final submission of the case to the jury, in the admission of improper evidence over the objection of its counsel.

Under the first ground, it is insisted that the conductor had no right or authority to authorize the plaintiff to walk across the track or bridge; that plaintiff was a trespasser; that he was doing; and that the evidence failed to prove, or tend to prove, that the servants of appellee were guilty of willful or wantonness in inflicting injury upon him. Whether or not the conductor could, under the peculiar circumstances of this case, bind the company by his directions to passengers long to his train need not be decided. We are of the opinion that, admitting the plaintiff below was a trespasser attempting to cross the bridge, the evidence fairly tends to show that his injury was the result of the willfulness of the conductor in charge of the train, and that his recovery should be maintained upon that ground alone. As appears from the foregoing



statement of facts, when he came to the south end of the trestlework other passengers had crossed over the same place and entered the train. He was some distance upon the bridge when the train, being but a short distance from the north end, without any signal or warning began to move backward over it. The evidence clearly tends to show that one of the men in charge was upon the rear end of the train, in plain view of the perilous situation of the plaintiff and those with him, and that he actually saw the danger, calling to them to run, but making no effort whatever to stop the train or give an alarm. It is said that even if the man in the blue uniform was one of the trainmen it does not appear that he could have prevented the injury by stopping the train. The rule is that the trial court should not take a case from the jury on the motion of the defendant unless the evidence, with all its reasonable inferences and intendments, fails to fairly tend to prove the plaintiff's case. It is well known that trains of cars for the carriage of passengers are always equipped with appliances by which signals may be given and communicated to the engineer to stop and start them. To say, as we must, that the object in placing a man upon the rear of the train was to look out for persons on the track and avoid accidents, and at the same time to assume, in the absence of all proof, that he was wholly without the means of stopping the train or making any effort to do so, would be unreasonable. We have often had occasion to hold that it is not for us to determine upon this issue whether the weight of the testimony justified the finding or not, but only whether there was evidence fairly tending to support the verdict. Such gross negligence as evidences willfulness will entitle a plaintiff to recover even though he be a trespasser. *Railroad Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112; *Blanchard v. Railway Co.*, 126 Ill. 416, 18 N. E. 799, 3 Am. St. Rep. 630. Such gross want of care and regard for the rights of others as will justify the presumption of willfulness or wantonness will make the defendant liable for injury to a plaintiff. *Railway Co. v. Bodemer*, 139 Ill. 196, 29 N. E. 692, 32 Am. St. Rep. 218, and cases cited. In *Railroad Co. v. O'Connor*, 189 Ill. 559, 59 N. E. 1098, and like cases, it was held there was no liability because there was an entire absence of evidence that the company's employees had knowledge of the fact that the plaintiff was on its track. We do not hold that it was the duty of the trainmen to anticipate the presence of trespassers on the tracks or to keep a lookout for them, but we do hold that when they knew that persons were there they had no right to willfully run them down and inflict injury upon them.

The appellant asked the court to instruct the jury that "the plaintiff, while upon the trestle, bridge, or viaduct of the defendant, was a trespasser thereon," which it refused, and it is insisted that such refusal was error. We do not think so. Whether he was a trespasser or not was a question of fact for



the jury under proper instructions, and the court, at the instance of the defendant, told the jury "that a trespasser who goes upon the property of another without the consent of the owner thereof"; and, further, that, "if the jury believe from the evidence that the plaintiff went upon the trestle, bridge, or viaduct of the defendant without the consent of the defendant, then the plaintiff was a trespasser thereon"; and if the plaintiff went upon such trestle, bridge, or viaduct without the consent of the defendant, then the plaintiff was a trespasser thereon"; and that, "as a matter of law, conductors and brakemen in charge of a train of a railroad company are not presumed to have authority to license or permit any person to go upon the private property of the railroad company outside of its station or station grounds; and, if the jury believe from the evidence that any conductor or brakeman employ of the defendant told the plaintiff that he might go upon the right of way, bridge, viaduct, or trestle of the defendant for his convenience in reaching a pleasure resort more than a mile distant from the railroad station, such statement by the conductor or brakeman gave no authority to the plaintiff to go thereon, unless it be shown that such conductor or brakeman had authority to give such permission." What could it ask on the question of the plaintiff being a trespasser, and what more could the court have fairly told the jury on that subject?

Another instruction asked by the defendant and refused to the effect that if the plaintiff was, at the time of receiving his injury, a trespasser upon the track of the defendant, he could not recover unless the injury was inflicted by the defendant through gross negligence or willfulness. It can only be said that all there is in that instruction applicable to the case was given in others at the instance of counsel for the defendant.

It is finally insisted that the court improperly admitted the testimony as to the effect of the injury upon plaintiff, in the difference in his conduct before and since the accident. This testimony tended to prove the extent, nature, and probable permanency of his injuries. It was not denied upon trial, nor does it seem to have been urged in the appeal that the injuries were of the serious character inflicted upon him. We have carefully considered the objection urged, the suggestions of counsel as to the incompetency of the testimony, and are unable to see wherein it was improper.

Plaintiff was permitted to exhibit the wound upon his leg to the jury, and this counsel says was error, although he admits that this court has held otherwise. We are familiar with no argument or citation of authorities to the contrary, and see no sufficient reason for not adhering to our previous decisions in that regard.

We are not unmindful of the importance of this case.

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to the plaintiff and the defendant; but after a thorough and painstaking consideration of the entire record we are unable to find any such errors of law as would justify this court in reversing the judgment of the appellate court, and it will accordingly be affirmed.

Judgment affirmed.

# ILLINOIS CENT. R. CO. v. JERNIGAN.

(*Supreme Court of Illinois, Oct. 25, 1902.*)

[65 N. E. Rep. 88.]

## Children—Contributory Negligence.\*

A child under the age of seven years is incapable of contributory negligence.

## Accident on Track—Negligence—Question for Jury.

Evidence in an action against a railway company for personal injuries to a person on the track examined, and *held* to show that the question of defendant's negligence was for the jury.

## Instructions.

Instructions that if defendant was guilty of the negligence "charged in the declaration," and such negligence was the proximate cause of plaintiff's injuries, he should recover, if in the exercise of ordinary care, were not objectionable as referring the jury to the declaration to determine the material issues.

Appeal from appellate court, Fourth district.

Action by Elmer E. Jernigan against the Illinois Central Railroad Company. From a judgment of the appellate court (101 Ill. App. 1) affirming a judgment for plaintiff, defendant appeals. Affirmed.

W. W. Barr, for appellant.

Wm. A. Schwartz and Andrew S. Caldwell, for appellee.

BOGGS, J. The appellee, then a child less than seven years of age, was on the 15th day of March, 1899, run upon by the rear car of a freight train on appellant's tracks, and his right foot, ankle, and leg so badly crushed and injured that it became necessary to amputate his limb. In an action on the case instituted in the circuit court of Jackson county against the appellant company to recover for such injuries, a judgment was entered in his favor in the sum of \$4,400, and the same has been affirmed in the appellate court for the Fourth district. This is an appeal from the judgment of affirmance.

It is urged the court should have sustained the motion entered by the appellant company at the close of all the testimony to peremptorily direct the jury to return a verdict in its favor. The grounds of the motion are: First, that it appeared from the testimony that the injuries suffered by the

\*As to the care required of children, see foot-note appended to *Citizens' R. Co. v. Hamer* (Ind.), 2 R. R. R. 9, 25 Am. & Eng. R. Cas., N. S., 9.

appellee were occasioned by his failure to use ordinary care for his own safety; second, there was a total lack of evidence to show that the servants of the appellant company in charge of the train were guilty of negligence.

In *Railway Co. v. Tuohy*, 196 Ill. 410, 63 N. E. 910, it was held, in analogy to the rule of the common law, which exempted children under the age of seven years from contributory responsibility, that up to the age of seven years a child may be regarded, as matter of law, as incapable of such conduct as will constitute contributory negligence. The appellee was under the age of seven years when he was injured, and on that reason the court should not have charged the jury that he could not recover, on the ground that his conduct contributed to his injury.

Nor could the court, under the circumstances disclosed by the evidence, declare, as matter of law, that the servants of the appellant company acted with due care. The train which injured the appellee consisted of an engine, eight freight cars and a caboose, and at the time was engaged in switching on the tracks of the company in the city of Murphysboro. The declaration alleged that the tracks of the company were there laid in one of the streets of the city. The company contended that its tracks were laid upon its own right-of-way. The locus in quo was never platted as a street, but it appeared from the testimony of George W. Andrews and Robert J. Jernigan, witnesses for the appellant, and other witnesses, that it was in use as a street, and the testimony tended to show that in the city, the appellant company, and certain owners of property, entered into an arrangement by which Thirteenth or Fourteenth street was extended through from Hanson street to Hall street. The place where the injury occurred was on such extension of street, between Hanson and Hall streets. There was a crossing upon the east side of the main track of the railroad. The employees of the appellant company in charge of the train intended to put some refrigerator cars which were in the switch upon the switch. The train had been moved some distance north of the switch, the locomotive being at the north end of the train. The train was put in rapid motion back toward the switch in order that the caboose at the south end of the train, when it was intended should be detached from the train, upon reaching the switch, would, when uncoupled, run off by its momentum along the main track past the northern end of the switch opening, while the remainder of the train would follow what more slowly, and could be turned into the switch opening when the caboose had passed the switch opening; both the locomotive and the caboose being all the time in motion. The train crew consisted of the engineer and fireman, the conductor and two brakemen. The engineer and fireman were in the engine. The conductor, Gutmann, and the two brakemen, Hartman and Eyesfelter, were in the caboose. The engineer was to alight at the switch target to throw the switch and



caboose had passed, and allow the remainder of the train to enter the switch. Eyesfelter was stationed upon the caboose to "ride it" past the opening of the switch, and check its motion at the proper place, farther down the main track. He noticed some boys near the track at about the point where the appellee was injured. One of these boys was the appellee, who had laid two pins across each other on one of the rails of the track, in order that the wheels of the caboose should run over them "and make scissors." After the caboose had passed, the appellee ran to the railroad track to get the "scissors," and while picking them up was run upon by the remainder of the train, which, as we before said, was backing down to the switch. There was no one upon the train except the engineer and fireman, who were on the engine. The conductor, Gutmann, and Brakeman Eyesfelter were in the caboose, and the other brakeman had ridden the caboose to the switch target, and had alighted for the purpose of opening the switch after the caboose had passed, in order to let the remainder of the train into the switch. There was evidence tending to show that the portion of the train which ran upon appellee was moving at a greater rate of speed than the ordinances of the city permitted. That the employees of the appellant company engaged in the management of the train were not guilty of negligence in thus operating the train at the place in question, and under the circumstances disclosed by the evidence, manifestly could not be declared as a matter of law. It was a question of fact to be determined by the jury.

Numerous objections preferred to the instructions given to the jury by the court have their basis in the allegations of the third count of the declaration as it was originally framed. A demurrer was sustained to this count, and the cause was heard upon the first and second counts, only, of the declaration. Counsel who present the case for the appellant company in this court did not appear in the cause in the trial or appellate courts, and were not advised by the record, as it came to their attention, that a demurrer had been sustained to the third count. An amended record afterward filed in this court disclosed that the third count had been held obnoxious to demurrer. Other of the objections presented against the instructions have reference to alleged errors in respect of the application of the doctrine of contributory negligence as a defense to the action. In view of the law as announced by this court in *Railway Co. v. Tuohy*, supra, that defense was not available to the appellant company, the plaintiff being a child under the age of seven years.

The complaint is not well taken that certain of the instructions referred the jury to the declaration to determine what were the material allegations thereof. It is for the court to determine what issues are raised by the allegations of the pleadings, and it would be error to refer a jury to the pleadings to determine for themselves the issues in a case. The

instructions in the case at bar were so framed as to advise the jury as to the course to be pursued if they "believe the weight of the evidence," defendant was guilty of the negligence charged in the declaration. Instruction No. 1 follows: "In this case, if you believe, from the weight of the evidence, that the defendant was guilty of the negligence charged in the declaration, and that such negligence was the proximate cause of the plaintiff's injuries, then you shall find the defendant guilty, provided you further believe from the evidence that the plaintiff at the time of the injury was exercising of reasonable care for his own safety." It may be said that as the representative of the other instructions to which the complaint is addressed. These instructions did not require the jury to construe the declaration in order to determine the legal effect of that pleading. The reference in the instructions is to the narration of facts in the declaration as constituting the charge of negligence, in order that the jury may determine whether such facts had been proven. 11 E. & Prac. 157. These instructions do not infringe the right of the court; it is for the court to construe the pleadings, and determine which of the allegations are material, and what issues are joined by the parties.

It is contended the court erred in refusing to give additional instructions which were asked by the appellant and refused. The reason advanced by counsel is a mere general statement that the refused instructions embodied principles of law applicable to the case, as to which the jury was not advised by any of the instructions that were given. "Mere general statements that a ruling is wrong, without attempt to point out wherein the error consists, or to state any reason or argument in support of the simple statement that error has occurred, discloses nothing to adverse the appellant and does not impose upon a court of review the duty of substituting an investigation of the record in order to ascertain if error of some nature or kind may not be found. The presumption obtains that the trial court ruled correctly in giving the instructions, and in order to overturn that presumption the appellant or plaintiff in error must affirmatively disclose the error intervened." *Chicago & A. R. Co. v. American Board Co.*, 190 Ill. 268, 60 N. E. 518. It appears, however, from an examination of the instructions, that they were properly refused,—some for the reason they erroneously stated the doctrine of contributory negligence as a defense; others because they proceeded upon the theory the duty and liability of the appellant company were unaffected by the proof of negligence on the part of the appellee, and the duty of the appellee to show the existence of a street at the place where the appellee was hurt.

The judgment of the appellate court is affirmed. Judgment affirmed.



GUCKAVAN *et al.* v. LEHIGH TRACTION CO.

(Supreme Court of Pennsylvania, Oct. 13, 1902.)

[53 Atl. Rep. 351.]

**Personal Injuries—Sufficiency of Evidence.**

Where two physicians and other witnesses testified in an action for personal injuries that prior to the accident plaintiff was a healthy, able-bodied woman, and thereafter she aged considerably, had a nervous tremor, lost in weight, had heart failure, and that her sufferings would be permanent, it sustained a finding that the injuries resulted from the accident.

**Witnesses—Credibility.**

Where, in an action against a street railroad company for personal injuries, a physician testifies that he had visited plaintiff, and admits that he had been sent by the company, but denies that he was its physician, plaintiff can show by cross-examination that the witness had, as a representative of the company, frequently visited and examined persons hurt in accidents on its line.

**Appeal—Review.**

The supreme court cannot consider objectionable remarks by counsel, where they are not brought on the record by affidavit and exception.

Appeal from court of common pleas, Luzerne county.

Action by William and Mary Guckavan against the Lehigh Traction Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Plaintiff was a passenger on one of defendant's cars. She testified that she was thrown from the car and suffered injuries to her spine.

A witness for defendant was asked: "Q. How often have you been sent by the company to examine people who were injured by accident? (Objected to.) A. I can't tell. (Objection not sustained, exception noted, and the bill sealed for defendant.) Q. How often have you been sent by the company to examine people who were in accident cases down in Hazleton, by this company?" (Objected to. Objection not sustained, exception noted, and bill sealed for defendant.) A. I don't know. Q. Give us some idea. You were sent in the Weir case?" (Objected to. Objection not sustained, exception noted, and bill sealed for defendant.) Q. You were here as a witness? (Objected to. Objection overruled, exception noted, and bill sealed for the defendant.) A. In the Weir case I was called, I believe, as a witness for the prosecution, because Mrs. Weir consulted me in my office,—consulted me in conjunction with Dr. ———. Q. What other cases have you been sent by the company in, to examine people who were hurt in an accident? (Objected to as immaterial and irrelevant.) The Court: You may ask how often. (Objected to. Objection overruled, question allowed, exception noted, and bill sealed for defendant.) A. I can't tell you. I have been sent to quite a number of accident cases. Q. By this company? A. By this company."

Defendant presented this point: "Under all the evidence,

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the verdict must be for the defendant. Answer. The plaintiff has asked the court to charge you on certain matters of law. The court declines to affirm any of the points."

"Defendant's counsel moves to have a juror withdrawn from the jury discharged from the consideration of this case, on the ground that plaintiff's counsel, in his closing address to the jury, against the protest of defendant's counsel, commented on the fact that the affidavit of Dr. Brundage as to what he would testify to was not offered; that he commented on the fact that plaintiffs were poor; that he stated it has come out here in the evidence that there were accidents after the accident on this road, and it was about time the public was protected against this company. Answer. The court declines to grant the motion."

Argued before McCOLLUM, C. J., and MITCHELL, J. BROWN, MESTREZAT, and POTTER, JJ.

John T. Lenahan, for appellant.

James L. Lenahan and C. B. Lenahan, for appellees.

BROWN, J. The refusal of the court below to grant defendant's first point is the subject of the sixth assignment of error. The reason given by the defendant for asking for binding instructions in its favor was that the plaintiff had shown that the injuries of which she complained had resulted from her fall from the car. The plaintiff testified that at the derailment of the car she was thrown from it, and that she and her family were fully justified in believing this statement. Prior to the accident she was a healthy woman,—a healthy, able-bodied woman,—but ever since, according to her own testimony and that of several witnesses, her condition has been distinctly impaired. One physician who had known her for 25 years as "a healthy, able-bodied woman," testified that since she was thrown from the car she had aged considerably, had a tremor, had lost in weight, and had heart failure. He testified that, in his judgment, her sufferings would be permanent. Another physician, called as an expert, stated that the plaintiff had progressive paralysis of the spinal cord, and was permanently disabled, that the trouble would constantly increase, and that a concussion or blow upon the spine might be a cause of the troubles he described. It was therefore for the court to say that no cause or connection had been shown between the accident and the injuries of which the plaintiff complained, but it was for the jury to determine whether the evidence showed, or tended to show, such a connection; and the learned judge properly left it to them to determine whether a reasonable inference could be drawn that the fall from the car was the actual cause of Mrs. Guckavan's condition and enfeebled condition.

The appellant complains of certain questions that were allowed to be put to its witness Dr. MacKellar on cross-examination. The examination in chief of this witness

## McGovern v. Smith

was hurtful to the plaintiff, would naturally have impressed the jury that when he called to examine the plaintiff on the day of the accident, and continued to visit her 10 or 12 times, he had done so either at her instance, or by direction of some member of her family. It was not developed by the company that he had been promptly sent to see her by its direction; but on his cross-examination this fact, for the first time, was properly brought out, and when he stated that the company had sent him he was further properly asked whether he was the company's physician, to which he answered that he was not. To affect his credibility, the questions complained of by the first, second, third, fourth, and fifth assignments of error were then asked, and ought not to have been disallowed, for it was legitimate for the plaintiff to show by cross-examination that the witness, who had stated he was not the company's physician, had repeatedly, at its instance, and as its representative, gone to examine persons hurt in accidents on its road; and that he had been so employed from time to time by the company was information properly drawn from the witness by the plaintiff for the consideration of the jury in determining what effect they ought to give to his testimony.

If it appeared from the record that counsel for appellees was guilty of the bad faith charged to him by the seventh assignment of error, we would unhesitatingly reverse this judgment. The record, however, does not only not disclose the misconduct complained of in connection with the affidavit of Abner Smith, but the charge is unqualifiedly denied by the accused. In *Com. v. Weber* (Pa.) 31 Atl. 481, and *Holden v. Railroad Co.*, 169 Pa. 1, 32 Atl. 103, we have clearly indicated how objectionable remarks of counsel can be made part of the record brought up for review; and if, in this case, such remarks were made, counsel now complaining of them failed to do what he ought to have done when they were uttered.

The assignments are all overruled, and the judgment is affirmed.

MCGOVERN v. SMITH *et al.*

(*Supreme Court of Vermont, Washington, Nov. 18, 1902.*)

[53 Atl. Rep. 326.]

## Personal Injuries—Medical Testimony.

Where, in an action for personal injuries, a physician had testified that plaintiff, as the result of his injuries, had a depression of the chest, caused by adhesion of the pleura thereto, it was proper to permit him to be asked on cross-examination if it were not true that numbers of men have such adhesions, and to be asked if men with such adhesions do not do a good deal of physical work.

## Witnesses—Conviction of Crime.

V. S. 1245, providing that the conviction of a crime involving moral turpitude may be given in evidence to affect the credibility of a witness, does not render it improper to ask a witness if he had not been convicted of the offense of selling intoxicating liquor, though such offense does not involve moral turpitude.



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**Evidence.**

In a civil case it was proper to permit the introduction of testimony of a witness on a former trial, where such witness was under the jurisdiction of the court, though no effort had been made to secure his attendance.

**Same.**

In an action for injuries to a person on the track it was proper to admit as subsidiary evidence, in connection with the testimony of a witness, a photograph taken by him of the scene of the accident thereafter, though he had never been in the photograph business, and had taken few pictures, and disclaimed being an expert.

**Same—Accident at Crossing.**

In an action for injuries to a person on the track it was proper to permit the engineer to testify that he did not know of anything that he could have done to stop the train that he did not do.

**Same—Medical Testimony.**

In an action for personal injuries, the opinion of a physician who examined plaintiff at the time of the injury, as to the probability of his recovery, was properly excluded, his opinion at the time of the injury being all that was admissible on a direct examination.

**Exceptions from Washington county court; Munson**

Action by D. S. McGovern against Hayes and Smith receivers. From a judgment for plaintiff, he brings exceptions. Affirmed.

Argued before ROWELL, C. J., and TYLER, S. J. WATSON, STAFFORD, and HASELTON, JJ.

Gordon & Jackson and F. L. Laird, for plaintiff.  
C. W. Witters, for defendants.

HASELTON, J. This was an action on the case to recover for injuries sustained by the plaintiff at a crossing of a road managed by the defendants. A trial by jury was had and a verdict was returned for the plaintiff to recover of \$4,250 as damages. Judgment was rendered on the verdict. The case was heard in this court on a bill of exceptions allowed to the plaintiff. January 27, 1897, the plaintiff was going over the crossing in question, which was in the city of Seattle, when he was run upon by a locomotive and train of cars. The plaintiff's evidence tended to show that his injuries were very severe, and that they were solely due to the negligence of the defendants.

The plaintiff introduced as a witness Dr. Charles C. Clark, who saw the plaintiff two or three times within a week after the time of the accident, and offered to show by this testimony that when he so saw the plaintiff it was his opinion as a physician that the plaintiff had very little chance of recovery. He asked the witness the following question: "From your examination which you made on that first day,—all you saw and learn about the man,—what was your opinion as a physician as to the probability of his living,—his recovery,—all?" The defendants objected, the court excluded the testimony, and the plaintiff excepted. In this there was no error. The physician's opinion at the time of the trial was not opinion evidence which he could properly give on direct

amination. In support of his exception the plaintiff cites *Turnpike Co. v. Cassell*, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 75. But that case does not sustain the plaintiff's contention. The second, third, and fourth exceptions were to rulings permitting cross-examination of the same witness as follows: "Q. Now, doctor, isn't it true that a large number of men have adhesions of the pleura to the lung? What do you say, doctor? A. Yes, there are a large number of people who have adhesion of the pleura to the chest. Q. And isn't it true that a large number of men have adhesions as marked as Mr. McGovern's adhesion, who do physical labor to a large extent? A. Yes. Q. Is it not true that when they have got such depression—or whatever you call it—as he has got, by reason of adhesion drawing in the chest, that men of his age do a great deal of work—physical work?" The witness was permitted to answer this last question also, but it does not appear what the answer was. There is nothing in the record to show what the doctor's testimony about adhesions, given on direct examination, had been, and so there is really nothing upon which to predicate a claim of error in permitting the cross-examination above set out. Assuming, however, that the doctor had testified that the plaintiff had the indicated adhesion, and that the testimony tended to show that it resulted from the injury complained of, the cross-examination above set out was proper. The second and third questions bore upon the probable impairment of strength and ability to labor resulting from the adhesion, and the first of the three inquiries was fairly preliminary to the others.

The plaintiff was a witness, and, for the purpose of discrediting him as such, the defendants asked him if he had been convicted of selling intoxicating liquor, and confined in the house of correction therefor, and elicited affirmative answers. The testimony was received under objection and exception, and the fifth and sixth exceptions relate to its admissibility. The offense of selling intoxicating liquor does not, in legal sense, involve moral turpitude. It ranks, rather, with breaches of the peace by assaults and otherwise. This being so, the plaintiff contends that the evidence was not admissible, and relies upon V. S. 1245, which reads: "No person shall be incompetent as a witness in any court, matter or proceedings, by reason of his conviction of a crime other than perjury, subornation of perjury, or endeavoring to incite or procure another to commit the crime of perjury; but the conviction of a crime involving moral turpitude may be given in evidence to affect the credibility of a witness." This statute was enacted to remove a common-law disability or incompetency, and at the same time it makes it a matter of legal right to attack the credibility of a witness by showing by independent evidence that he has been convicted of a crime involving moral turpitude. But this statute does not limit the field of cross-examination which, in the sound discretion of the court,



counsel may be allowed to go into with a view to shake the credit of a witness. In *State v. Shaw*, 73 Vt. 149, 50 A. 101, the respondent, when on the stand as a witness in his own behalf, was asked if, on a day named, he had not pleaded guilty to an assault, and answered that he had. The evidence was held admissible as tending to affect his credibility. It was held in that case that the mode of proof was not in question, and the same might be held here if the court regarded the line of argument in the plaintiff's brief. But we think that if the trial court, in its discretion, permits the cross-examination and imprisonment of a witness for an offense not involving moral turpitude to be gone into, the permission should be exercised by way of cross-examination, and not prepared to say that the examiner inquiring about the witness of such grade is not bound by the answers of the witness. In *McLaughlin v. Mencke*, 80 Md. 83, 30 Atl. 603, it was held not error to permit counsel, on cross-examination of a witness for the purpose of discrediting him, to show that he had been convicted of drunkenness and confined in jail. In that case the mode of proof the court say: "While there is some conflict in the authorities and text-books, as well as in the cases, upon this subject, we think the more reasonable and practicable rule is that which does not demand the production of the record when the object, as here, is solely for the purpose of discrediting." In *Clemens v. Conrad*, 19 Mich. 409, the court, speaking by Cooley, C. J., say: "We think the reasons for requiring record evidence of conviction have little application to a case where the party convicted is on the stand, and is questioned concerning it, with a view to sifting his character upon cross-examination." See also, *Wilbur v. Flood*, 16 Mich. 40, 93 Am. Dec. 211; *People v. Cummins*, 47 Mich. 334, 11 N. W. 184, 19 Am. Whart. Cr. Ev. § 474, it is said: "In this country there has been some hesitation in permitting a question, the answer to which not merely imputes disgrace, but touches on the character of record; but the tendency now is, if the question be asked for the purpose of honestly discrediting a witness, to allow an answer." In *State v. Ellwood*, 17 R. I. 763, 24 A. 101, the respondent, who was a witness in his own behalf, was examined as to a former conviction of crime, though the record of such conviction was not produced, and the exclusion was held not to be erroneous. We conclude that a witness may be cross-examined as to conviction and imprisonment whenever such conviction and imprisonment are to be shown. As has been already intimated herein, it is a matter of legal right in this state to show in any way the conviction of a witness of an offense not involving moral turpitude. The question of the reception of such evidence is determined by the sound discretion of the trial court, and we are satisfied that there was no abuse of discretion in permitting the examination complained of.

One Dr. Jacobs had been improved by the defendants as a witness on two previous trials of this case. On this trial the defendants, under objection and exception, were permitted to introduce the testimony of Dr. Jacobs as given at a previous trial. The court found that the witness Jacobs was without the state, that his absence was of a permanent character, and that his whereabouts at the time of this trial were unknown to the defendants. The plaintiff claims that the admission of this evidence was error, because there was no finding of the court that the defendants used due diligence, or any diligence, in ascertaining the whereabouts of the witness, or had made any efforts to procure his attendance. No other reason for its exclusion is argued. Under the rule laid down by both Stephen and Greenleaf, no such finding was necessary to make the evidence admissible, the case being a civil one. Steph. Dig. Ev. (Chase's Ed.) 108; Greenl. Ev. (15th Ed.) 234. The requirement of diligent search recognized by these writers is not applied by them to a case in which the witness is without the jurisdiction, as a careful reading of what they say clearly shows. There is, however, some disagreement among the decided cases, and this disagreement is pointed out in a note in each of the above text-books. On the findings of the county court, the evidence of Dr. Jacobs was admissible under the rule applied in numerous cases, among which are the following: *Magill v. Kauffman*, 4 Serg. & R. 317, 8 Am. Dec. 713; *Howard v. Patrick*, 38 Mich. 795; *City of Omaha v. Jensen*, 35 Neb. 68, 52 N. W. 833, 37 Am. St. Rep. 432; *Reynolds v. Powers*, 96 Ky. 481, 29 S. W. 299; *Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co.*, 51 Minn. 304, 53 N. W. 539; *Emerson v. Burnett*, 11 Colo. App. 86, 52 Pac. 752; *Bensen v. Shotwell*, 103 Cal. 163, 37 Pac. 147; *Railroad Co. v. Osborn* (Kan.) 67 Pac. 547; *Bank v. Bradley* (Ala.) 30 South. 546; *Kellogg v. Secord*, 42 Mich. 318, 3 N. W. 868; *City of Ord v. Nash*, 50 Neb. 335, 69 N. W. 964; *King v. McCarthy*, 54 Minn. 190, 55 N. W. 960; *Hill v. Winston*, 73 Minn. 80, 75 N. W. 1030. When a witness is permanently without the state, the only object of requiring diligence in ascertaining his whereabouts would be that his deposition might be taken; but, if he has already testified in open court in the identical case in which his testimony is desired, and his testimony has been fully taken by an official stenographer, so that it can be exactly reproduced, his testimony so taken is at least as satisfactory as his deposition could be. This view of the matter is fully and satisfactorily discussed in the case of *Emerson v. Burnett*, above cited. It is proper to be observed that, under a rule established by this court depositions that have been once used on trial may be thereafter used by either party. In the case of *Magill v. Kauffman*, above cited, it was noted that a statute of Pennsylvania would have permitted the deposition of a witness to be used if it had been used on a former trial of the same case, and, though the statute did not extend to the

case of a witness who had testified in open court, it was held that a deposition and testimony in open court stood on the same footing. In one of the cases above referred to, an absent witness whose testimony was offered had, as the witness here, testified on two previous trials of the same case, and it was held that the fact that his testimony on one of the previous trials was alone offered did not affect its admissibility. On the findings made by the trial court the testimony of Dr. Jacobs was properly received. Had the matter would stand if the case had been a criminal one, it is excluded from inquiry. It is needless to suggest that, were it a criminal case, questions would arise which are not now presented, and which would demand careful consideration.

The defendants improved as a witness one A. F. Childs, whose evidence tended to show that soon after the accident he took a kodak view of the crossing in question. Childs testified that he had taken but a few photographs previous to the one in question, and that he had not had any experience in the business of photography. He disclaimed being an expert. The plaintiff's evidence tended to show that the photograph in question was inaccurate, and could not have been taken at the time claimed. The court ruled, upon the above evidence, that the witness was competent to testify as a photographer, and thereupon the witness described how and when he took the photograph, and the photograph was admitted in evidence. The plaintiff had an objection to the ruling that the witness was competent to testify as a photographer and to the admission in evidence of the photograph. There was sufficient evidence to warrant the ruling, or, to speak more correctly, the finding that the witness was competent to testify as a photographer. The fact that the witness did not consider himself an expert was not a means conclusive. *Boardman v. Woodman*, 47 N. H. 100. It was immaterial that such knowledge as he had of photography was not acquired in the pursuit of that art as a business. The limited character of his experience went to the weight of his testimony, rather than to his competence to testify. It does not appear from the record that the photograph was admitted as independent evidence, and therefore it will be presumed that it was admitted, in connection with the testimony of the witness Childs, as subsidiary evidence. No error is found in the action of the court in respect to the admission of the testimony of the witness Childs, nor in the reception in evidence of the photograph.

The engineer on the train in question testified in behalf of the defendants as to what he did to stop his train when he saw there was likely to be an accident, and that he could know of anything more he could have done to stop the train. The plaintiff had an exception to the admission of the testimony of the engineer as to what he did to stop the train, on the part of the evidence so given on the ground that the testimony should have been confined to what he actually did, and



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have been allowed to state matters of speculation. But the witness did not state matters of speculation. It was material to know what the engineer did, and what, if anything, he left undone, regarding the stopping of the train. It may be that the witness testified as an expert engineer without an express finding that he was such; but no objection was made on that ground. The objection made is not sustained.

One other exception to the admission of evidence was taken at trial and appears by the record, but was abandoned in argument. This exception is therefore not considered. Judgment affirmed.

WOLCOTT v. NEW YORK & L. B. R. Co. *et al.*

(*Supreme Court of New Jersey, Nov. 10, 1902.*)

[53 Atl. Rep. 297.]

**Crossing—Flagman's Negligence—Question for Jury.**

Where there was a conflict in the evidence as to whether a flagman stationed at a railroad crossing at night was in the middle of the road on the south edge of it, and also whether he waved his lantern as a warning to the approaching traveler, the question of the flagman's negligence was for the jury.

**Assumption of Duty to Maintain Flagman.\***

Where a railroad company assumed the duty of protecting a crossing by a flagman, it was bound to do so with reasonable care, and the question whether the duty of placing a flagman there rested on it was immaterial.

**Claims—Contributory Negligence.**

Whether decedent, driving over a railway crossing where there were no separate tracks, was guilty of contributory negligence in driving after he saw the headlight of an approaching train when he was on the first track, was for the jury.

**Action by Bloomfield I. Wolcott, administrator, against the New York & Long Branch Railroad Company and others.** Plaintiff was nonsuited as to one of the defendants, and verdicts were rendered against him and in favor of other defendants, and there was a verdict in favor of plaintiff and against the New York & Long Branch Railroad Company. Rule to show cause. Discharged.

Argued June term, 1902, before GUMMERE, C. J., and AN SYCKEL, FORT, and GARRETSON, JJ.

R. V. Lindabury and John S. Applegate, for the rule.  
Edmund Wilson, contra.

GUMMERE, C. J. This suit was brought against the New York & Long Branch Railroad Company, the Central Railroad Company of New Jersey, the New Jersey Southern Railway Company, and the Pennsylvania Railroad Company to recover damages for negligently causing the death of Paul Wolcott, the plaintiff's intestate. A nonsuit was

\*See foot-note appended to *Dolph v. New York, N. H. & H. R. Co.* (Conn.), 2 R. R. R. 35, 25 Am. & Eng. R. Cas., N. S., 35.

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granted in favor of the New Jersey Southern Railroad Company at the close of the plaintiff's case. A verdict was in favor of the Central Railroad Company of New Jersey on the question of the liability of the New York & Long Branch Railroad Company and of the Pennsylvania Railroad Company was submitted to the jury, who returned a verdict in favor of the latter company as against the plaintiff, and in favor of the plaintiff as against the New York & Long Branch Railroad Company. This rule was allowed to the Central Railroad Company, and the two questions which it presented for decision are whether the evidence will support the conclusion reached by the jury that the death of the plaintiff's decedent was due to negligence of the company or of any of its employees, and, further, whether the deceased was not contributorily negligent.

On the first point the following facts are pertinent. At the crossing where the deceased was killed there are nine tracks, four of which are tracks of the Long Branch Railroad Company and the remaining five tracks of the Jersey Southern Railroad Company. The tracks are not all parallel, those of the Jersey Southern Railroad Company being at a considerable angle from those of the Long Branch Railroad Company. Although these tracks are owned by two different companies, they are all under the management and control of the New York & Long Branch Company. Approaching the crossing from the direction in which the deceased was driving, the Jersey Southern tracks are first reached, then a triangular piece of ground is encountered, lying between the two sets of tracks, and then the tracks of the New York & Long Branch Railroad Company are reached. The distance from the first track of the Jersey Southern road to the last track of the Long Branch road, measured on one side of the highway, is about 82 feet, and measured on the other side of the highway is 112 feet. A flagman was kept at this crossing by the New York & Long Branch Railroad Company, to warn travelers along the highway of approaching trains. At the time of the accident this flagman held up his position in the triangular space already referred to. It was after dark, and he had his lantern in his hand. What part of the highway he stood was disputed. He testified that he was in the middle of the road; other witnesses testified that he was on the south edge of it. After taking his position he watched for the approach of the train, which was longed to the Pennsylvania Railroad Company, and was passing over the New York & Long Branch Company tracks. He testified that when he saw it appear he turned, and then saw the decedent's wagon approaching the crossing; that it was on the opposite side of the electric light plant, which was immediately adjacent to the first track of the Southern road, and that (the wagon) was about to enter upon that track; that he swung his lantern and shouted a warning, but that the deceased continued on his way over the tracks until he reached the furthestmost track of the Long Branch road.



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was there run down by the train. The testimony of the decedent's wife, who was in the wagon with him, was to the effect that the lantern was not swung; that its light remained stationary.

Whether or not a duty rested upon the Long Branch Company to protect this crossing by a flagman or not is immaterial. It is assumed that duty, and, having done so, was bound to perform it with due care. Where the flagman stood, and whether he waved his lantern or not as a signal that a train was approaching, were matters in dispute. If he stood on the southern edge of the highway, not in the wagon way at all, as some of the witnesses say, and if he gave no signal with his lantern, as decedent's widow testifies, it cannot certainly be said, as matter of law, that he fully and carefully performed the duty which he had undertaken, of giving warning of the approaching train. It was for the jury to determine where he stood and what he did, and, if they found that he stood by the side of the road and gave no signal with his lantern, then to say whether he gave efficient warning to the deceased.

Other facts, in addition to those which have been recited, enter into the consideration of the question whether the deceased was guilty of contributory negligence. The conditions which existed in the neighborhood of the crossing, on the side from which the deceased approached it, show that there was a view down the tracks of the Long Branch road, in the direction from which the train was coming, at a point 75 feet from the crossing, but that, as the distance decreased, the view was frequently interrupted by the presence of houses and other obstructions. The night was a dark one, and it does not appear that the deceased was familiar with the crossing. There were a number of electric and other lights in the neighborhood of the crossing which illumined the surroundings more or less. The evidence is in favor of the conclusion that a bell was rung on the train, but decedent's wife says she did not hear it.

All of these facts, taken together, do not conclusively show contributory negligence on the part of the decedent. To what extent his view in the direction of the approaching train was impeded before he reached the electric light plant is unimportant, for up to that time the train had not come in sight. This is shown by the testimony of the defendant's flagman, who testified that after going upon the crossing he was "watching the train to come down the Long Branch north-bound track," and then said, "and when I saw it appearing, coming down, I turned, and I saw this wagon coming right opposite the electric light plant." After reaching this building, his view down the track was intercepted by it until he had passed beyond it. Although the engine bell was ringing at that time it cannot certainly be said that he heard it; for his widow swears that she did not, and her opportunity for doing so was equally as good as his. After

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passing beyond the electric light building, he almost ately came to the first of the Southern Railway. Assuming that he then saw the headlight of the approaching locomotive, what was he to do? Could he be at all that the train was not coming upon the very track then crossing? Was he less prudent in driving over the other tracks of the Southern road, than he would have been if he had remained on the first track until the train had passed, bearing in mind that there is nothing in the law to show that he was at all familiar with his surroundings? And, after he had crossed the Southern tracks and entered the triangular space, did he suppose that all danger had passed; that he had reached a place of safety, and was on his way without further risk? Was he taken by surprise when he came to the tracks of the New York & Long Island road, and, if so, was he less careful than a reasonably prudent man would have been in attempting to cross over them for the purpose of avoiding the train? All these and other questions present themselves in determining whether or not the deceased was guilty of contributory negligence. The decision was clearly for the jury, not for the court, and the court determined them in favor of the plaintiff.

In our opinion, the evidence in the case fairly supports the finding of the jury, both on the question of the negligence of the defendants and on that of the contributory negligence of the plaintiff's intestate, and the rule to show cause is discharged.

## OLNEY v. BOSTON &amp; M. R. R.

(*Supreme Court of New Hampshire, Hillsborough, June 3, 1897.*)

[52 Atl. Rep. 1097.]

## Injury to Employee—Defective Appliance—Promise to Repair

A locomotive engineer, having noticed that the cover of a "hole" on the locomotive boiler had become loosened, called to the attention of the foreman of the repair shop, who promised it would be repaired. The promise was not fulfilled, and on the next day, while the engine was in motion, the engineer went out on the board to fasten the cover. It suddenly fell, causing him to start and hastily reach for it, and he lost his balance and was injured: *held*, that the failure to repair might be found to constitute negligence on the part of the master.

## Same—Same—Proximate Cause.

The question whether the failure to repair was the proximate cause of the injury was one for the jury.

## Contributory Negligence.

The engineer testified that, if he had remained in his cab, no stop could be made, injury might result to himself and other passengers, and the master's property as the cover might have fallen, and in connection with the machinery: *held*, that the question whether plaintiff was guilty of contributory negligence in attempting to fasten the cover was a question for the jury.

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**Assumption of Risk.**

It appeared that according to the regulations of the road it was the duty of engineers, before starting on a trip, to inspect their engines, and see that they were in "proper condition"; that it was plaintiff's custom to examine his engine after the completion of a trip, and that after the completion of the trip before that on which the accident happened he had reported the defect to the foreman of the repair shop, who had promised to remedy it: *held*, that the question whether plaintiff had failed to exercise such care that he could be considered as having assumed the risk was for the jury.

Transferred from superior court; Pike, Judge.

Action by Austin J. Olney against the Boston & Maine Railroad. Verdict for defendant, and case transferred on plaintiff's exceptions. Exceptions sustained.

The plaintiff, an engineer of experience, was employed by the defendants in running a freight train from Woodsville. At the time of his injury the engine upon which he was then riding had been used by him daily, Sundays excepted, for about 10 months. On the side of the engine, at the forward end, and below the base of the smokestack, was an arm hole, over which was a cover. A little below the arm hole, and farther ahead, was a signal lantern like those in general use upon locomotives, which for a long time had been used by the plaintiff and his fireman as a means of support when passing to a point farther along on the engine. On the right side of the cab a door opened outward upon a running board or walk, intended for use when the engine was in motion or at rest, which extended along the side of the boiler toward the arm hole. Above the running board, and intended as a means of support for persons walking thereon, was a hand rail, which extended toward the front of the engine to a point just beyond the steam chest, but did not reach as far forward as the arm hole by about 12 inches. The plaintiff was injured on Monday, November 30, 1896. About seven or eight months prior to that date, while upon his run, he discovered that the arm-hole cover had become so worn as to be out of order, and in consequence of the lack of repair had worked loose. He went out of the cab door along the running board, and tightened the cover by pressing it in with one hand and pulling the handle with the other, so that the lips on the cover gripped wedge-shaped ridges designed for this purpose. On Thursday before the accident, and while the engine was in motion, the cover again became loose, and the plaintiff tightened it as before. Upon reaching Woodsville that afternoon, he informed the foreman of the repair shop of its condition, and the latter said he would have it fixed that afternoon, but failed to do so. The next day the plaintiff saw that the repairs had not been made; and on the following day the cover again became loose while on the road, and the plaintiff tightened it in the manner above described. Upon his return to Woodsville that afternoon he again told the foreman of the defendants' repair shop that the cover was defective, and said it was not fit to make



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another trip with. The foreman said it should be repaired before the plaintiff's trip on Monday. According to the regulations of the road, it was the duty of all engineers to inspect their engines before starting upon any trip, to see if they were "in proper condition for the service required; if not, to put them in proper condition, or know that they were so, before using them." The plaintiff customarily made inspection the evening before starting, after the engine was housed; and as a part of his duty he so made it in this instance. The plaintiff relied upon the promise of the foreman that he would repair the arm-hole cover, and did not expect it after Saturday to ascertain whether he had done so. On Sunday morning, while running out of the Woodsville yard at a speed of four or five miles an hour, the plaintiff discovered that the cover had not been repaired, and, in consequence, was again loose. Thinking that it would fall if not tightened, he went out through the cab door, and along the rear platform board, grasping the hand rail with his left hand until he reached the end of the rail, when he stepped down upon the top of the steam chest, and then, releasing his hold upon the rail, reached for the cover to take hold of it with both hands—the use of both hands being necessary in securing it in place. The plaintiff did not succeed in grasping the handle, for just as he touched the cover it fell out. "Naturally," "involuntarily," "instinctively, and without thought," "without thinking about it," as he testified, he grabbed for the cover as it fell. In doing so he lost his balance, and in falling struck the top of the signal lamp, which, in consequence, was knocked apart, and failed to prevent his fall to the ground, by which he was injured. The plaintiff testified that when the cover was loose the arm hole emitted smoke and sparks, endangering property, and affecting the draft so that the engine did not steam properly; that there was also great danger to life and property from the liability of the cover to drop and cause a wreck by getting under the trucks or into the head; that these dangers could be averted in less time by the method he adopted than by stopping the engine; that the method was a proper one under the circumstances; and that he did not suppose the lantern was stronger or different in any particular from other signal lamps in use. There was no evidence tending to show that it was different in any particular. At the close of the plaintiff's evidence, and subject to his exception, a verdict was ordered for the defendants.

Burnham, Brown &amp; Warren, for plaintiff.

Oliver E. Branch and William H. Sawyer, for defendants.

PARSONS, J. The claim that the case does not disclose evidence tending to show a want of due care on the part of the defendants in the performance of their masters' duty to provide a reasonably safe machine for the use of the employee, is not sustained by the record. The evidence

directly to the fact that the loose hand-hole cover rendered the engine unsafe, and that the defendants, in the person of the individual vested with the duty of repair, had been notified of the defect, and had promised to make the needed repair. It cannot be said that these facts do not furnish evidence from which the failure to make such repair might be found to constitute negligence. For the negligence of the agent to whom the defendants had intrusted their masters' duty of providing safe and suitable machinery, the defendants are liable. *Jaques v. Manufacturing Co.*, 66 N. H. 482, 22 Atl. 552, 13 L. R. A. 824. The defendants contend that the negligence of the defendants was not the proximate cause of the injury. "In this state it is well settled that the question of remote and proximate cause is a question of fact to be determined by the jury." *Ela v. Cable Co.*, 71 N. H. 1, 3, 51 Atl. 281. The question is whether there is evidence upon which the finding that the defendants' negligence was the legal cause of the injury can properly be made. *McGill v. Granite Co.*, 70 N. H. 125, 129, 46 Atl. 684. The plaintiff's evidence was that, upon observing that the cover was loose, he shut off steam, and at once went forward upon the engine, as it was his duty to do, for the purpose of putting it into place; that he stepped down onto the steam chest; that as he reached for the handle of the cover, and just as he touched it, it suddenly fell, causing him instinctively and involuntarily to reach for it, whereby he lost his balance, and was injured; and that there was no sudden lurch of the engine, which at the time was moving at a speed of four or five miles an hour. The case distinctly states that the looseness of the cover discovered by the plaintiff was "in consequence of the lack of repair." Upon this evidence it would not be unreasonable to infer that it fell because of the lack of repair. That such a cover might fall, if not securely fastened, is not only reasonable, but probable; and that its fall might produce an accident to the train and injury to the trainmen is also a reasonable conclusion upon the evidence. The causal connection between the defendants' negligent failure to repair and an injury received by the plaintiff in such an accident, occurring either without discovery of its condition or after discovery before the train could be stopped, would be too plain for argument. Also, if the plaintiff had been going forward upon the engine to adjust the headlight, in innocent ignorance of any defect in the fastening of the cover, and, while passing upon the steam chest, was caused to lose his balance and fall by the sudden dropping of the cover, it would seem plain that the fall of the cover was the proximate cause of the injury, and that, if such a fall were due to the defendants' negligent repair of the cover, the causal connection between the defendants' negligence and the plaintiff's injury would be in no degree remote. The fact that the engineer observed the looseness of the cover, went forward to adjust it, and was pre-



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paring to do so when it fell, does not destroy the causal relation between the defendants' negligence and the injury. It raises the question whether an intervening responsibility of the plaintiff, not present in the case suggested because of supposed ignorance without fault, has relieved the defendants from liability. It is claimed that the proximate cause of the plaintiff's injury was his loss of balance. This was the last physical manifestation in the chain of causes which permitted the force of gravitation to drag him to the ground, but the last apparent cause is not necessarily the proximate cause of the injury. There may have been some other cause for the loss of balance which legally and logically was the proximate cause of the injury. The question is whether there was evidence from which a jury might properly find that there was such ultimate proximate cause for which the defendants were legally responsible. As has been suggested, the testimony tended to prove that the plaintiff was at the place where he lost his balance in consequence of the defendants' negligence in putting the locomotive in proper repair. A jury might reasonably find that the loose cover was liable to fall just as it was touched by the plaintiff; that the plaintiff's attempt to recover it was natural, and to be expected under the circumstances. There was no testimony whatever tending to show that the loss of balance was due to an independent intervening cause, while there was direct testimony from the plaintiff that the same was not due to a sudden lurch of the engine, as claimed in argument, if that fact be material. There was evidence that the plaintiff's injury was caused by the defendants' breach of duty, the plaintiff had the right to have this evidence weighed by the jury, unless it conclusively appeared from the evidence in the case either that the injury arose from an assumed risk, or that the plaintiff's fault was a part of its cause. Assumption of risk is purely a matter of contract. While there are rarely any stipulations expressing the contract of hiring, by remaining in the service the plaintiff assumes the risk of injury from defects in the machinery of which he knows, or which reasonable inquiry would disclose to him. Continuance in service with knowledge of the risk is generally conclusive evidence of the plaintiff's agreement to assume it. *Collins v. Car Co.*, 68 N. H. 196, 38 Atl. 1047. When, after discovery of the defect, the servant has no opportunity to leave the service before the injury is received, there is no ground for the legal implication of such a contract. *Casey v. Railway Co.*, 68 N. H. 196, 38 Atl. 92, 16 Am. & Eng. R. Cas., N. S., 361; *Deming v. Sawyer*, 95 Me. 295, 49 Atl. 1035. The voluntary assumption of the risk is essential to the contract. *Fitzgerald v. Boston & M. R. R.*, 155 Mass. 155, 159, 29 N. E. 464, 31 Am. St. R. R. Cas. 170; *Limberg v. Lumber Co.* (Cal.), 100 Cal. 49, note (s. c. 60 Pac. 176). As the unrepaired defect was not discovered until the danger arising from driving

engine in that condition existed, if the plaintiff's ignorance of the lack of repair was not due to his own fault, the risk of injury resulting directly therefrom, or from a proper effort to remove or escape from the danger, was no part of the plaintiff's contract of employment. If the plaintiff had been employed to make the repair when he had in safety an option to do so or not, his contract to do so would have included an assumption of all the risks which he knew or ought to have known, and the fact of his previous knowledge of the looseness of the plate would be a bar to a recovery for its fall; but, as his contract was to run a suitable engine, he did not contract to bear the risk of injury which might come to him from the unknown defect if injured before he discovered it, or after discovery thereof before by reasonable care he could prevent injury to himself. After the defect became patent, the plaintiff was bound to exercise reasonable care to avoid injury. If he did not, his want of care would be contributory negligence barring a recovery.

Assuming that he was not in fault for not knowing before he started that the plate had not been repaired,—a proposition hereafter considered,—upon his subsequent discovery his rights are dependent upon the presence or absence of fault upon his part as constituting contributory negligence. The plaintiff's evidence was that the loosened plate presented a situation of danger; that, if he remained in the cab until a stop could be made, injury was probable to himself and the other trainmen and the defendants' property; that to go forward upon the engine was not unusual, but was in fact part of an engineer's duty; that he had himself put the plate in position upon other occasions. Doubtless he could have secured his personal safety with little risk by abandoning his post of duty, and leaving the lives and property intrusted to his care without protection. It was his duty to his employers and his fellow trainmen to endeavor to prevent an accident. His attempt to do his duty is not, as matter of law, negligence. *Stone Co. v. Mooney*, 61 N. J. Law, 523, 39 Atl. 764, 39 L. R. A. 834. Whether the course he adopted was that dictated by reasonable care is matter of fact upon which on the evidence fair-minded men might come to different conclusions. Being compelled to choose in a situation of danger between different courses of action, the fact that what he did resulted in injury, while by an opposite course he could have escaped harm, does not conclusively establish his fault. *Folsom v. Railroad Co.*, 68 N. H. 454, 38 Atl. 209. As there was evidence tending to show that it was the plaintiff's duty—the performance of which was necessary to prevent serious harm—to tighten the plate when it became loose, and that the proper method of performing this duty was to go forward upon the engine for that purpose without waiting for a stop, his attempt to perform this duty in a proper and necessary manner is not conclusive evidence of negligence. His actual knowledge that

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the plate was loose, and might fall at any moment, dence upon the care it was his duty to exercise to avoid by its fall. The peril to himself and others if he did not proceed in tightening it before it fell is also evidence upon care which the prudence demanded by the situation required of him. A jury may think that the danger to the train from the fall of the plate was so slight that the fact that he attempted to tighten it instead of stopping the train, and the fact that its sudden fall caused him to lose his balance, does not establish his want of care. Such may be the fact, but upon the evidence a different conclusion would not be unreasonable.

It is further urged that the plaintiff was in fault for not ascertaining by inspection immediately before starting the train whether the promised repair had not been made. It was the plaintiff's duty, under the rules, to inspect the locomotive; but it was not, as a matter of law, at fault for performing such duty at the close of the previous day's work instead of immediately before starting out. One object of the inspection duty imposed upon the plaintiff was to discover defects arising in use of the locomotive. Inspection at the close of a trip would give an opportunity to make minor repairs before the next trip. This would be a reasonable why the time chosen might be found appropriate. The evidence relied upon by the defendants must be given a reasonable construction and application. It cannot be construed to make the defendants' employees insurers of the "proper condition" of all appliances used by them, or to relieve the defendants of liability for the breach of their masters' duty. So far as material to the present question, it may properly be said that Olney's inspection of the engine disclosed that it was in proper condition in all respects except the arm-hole defect, and that between the time of his inspection and his next use of the engine no new defect arose; for there is no suggestion of any defect as a cause of the injury, discoverable Monday morning, which was not equally discoverable Saturday morning. The evidence tended to show that Olney inspected the engine as required by the rule, and discovered that it was "in proper condition for the service required." It was his duty to make the necessary repair. He reported the defect to the proper person representing the defendants. The employee had given notice of the defect to the proper officer whose duty it was to make repairs, and the impression had been conveyed to him that these would be made, and he had the right to assume that they had been made, and to act upon that assumption." *Railroad Co. v. Babcock*, 154 U. S. 200, 201, 14 Sup. Ct. 978, 38 L. Ed. 958. Here the evidence tends to establish, not an "impression" in the plaintiff's mind that the repairs would be made, but an express promise to the defendants that they should be. In the face of the duty of the employers to make repair and their express promise to do so, it cannot be said as a matter of law that Olney, when he started, did not have reasonable grounds for belief that



knew his engine was in proper condition for use. The express assertion of the employer to Olney, just before starting, that the repair had been made, would be evidence of greater weight, but of the same character, as the promise upon which Olney's knowledge or belief of the condition of his engine was based. There was evidence that the inspection was made, and that Olney knew or believed with reason that the engine was in proper condition. Olney's contract of employment, as evidenced by the defendants' rule, did not necessarily require him to reinspect the engine to ascertain the performance of the duty devolving upon the employer by law and express contract. A failure to strictly comply with the rule would not necessarily bar the plaintiff's action, but such failure would be evidence on the question of the plaintiff's care. *Deverson v. Railroad Co.*, 58 N. H. 129, 132. Whether due care which the plaintiff was required to exercise for his own safety demanded that he should examine the engine in the morning to ascertain whether the repairs had been made is a question of fact. Upon this question the promise to make the repair before the next trip is evidence. Whether the obligation to exercise care was or was not satisfied by entire reliance upon the foreman's promise would depend upon all the facts in evidence, and is for the jury. *Burnham v. Railroad Co.*, 69 N. H. 280, 45 Atl. 563, 16 Am. & Eng. R. Cas., N. S., 320; *Keevan v. Walker*, 172 Mass. 56, 51 N. E. 449.

The cases of *Schulz v. Rohe*, 149 N. Y. 132, 43 N. E. 420, and *Steel Co. v. Mann*, 170 Ill. 200, 48 N. E. 417, 40 L. R. A. 781, 62 Am. St. Rep. 370, relied upon by the defendants, are not in point. In the first case there was no promise to repair. A direction to make repair was given by the foreman to another servant in the plaintiff's hearing. Liability was denied upon the ground that the plaintiff resumed the use of the machine without direction from his employers, and that the failure to make repair was the negligence of a fellow servant; while the second case is that of a servant continuing to work with knowledge that the repair had not been made, because the defect was obvious. "That the servant, when he is called upon to work with an appliance which he has ceased to handle since the master promised to repair it, may or may not be justified, according to the circumstances, in acting upon the presumption that the repairs have been completed, is clear both upon principle and authority." Note to *Steel Co. v. Mann* (Ill.) 40 L. R. A. 799 (s. c. 48 N. E. 417, 62 Am. St. Rep. 370). In this case the evidence of previous failure of the foreman to make repair as promised tends to prove that a prudent man would not have relied upon the promise in this instance. Such evidence does not, however, give this court power to pass upon the question.

Though the evidence upon the issues essential to the plaintiff's case is not entirely clear or satisfactory, yet it is not so conclusive against him upon any point that it can be said that

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a finding in his favor would be without reason. The should have been submitted to the jury. Whether other points in the evidence aside from those discussed, is or is not made for the jury, is not considered.

Exceptions sustained; verdict set aside.

WALKER, J., did not sit. The others concurred.

## ILLINOIS CENT. R. CO. v. GHEEN.

(Court of Appeals of Kentucky, June 13, 1902.)

[68 S. W. Rep. 1087.]

**Damages—Duty of Injured Person to Prevent Further Injury.\***

It was the duty of an injured servant of a railroad company, who wrongfully refused admission to the company's hospital, to use that a person of ordinary care and prudence would use to prevent injury, but he was not bound to use the utmost care that any might use.

"Not to be officially reported."

Petition for rehearing. Denied.

For former report, see 66 S. W. 639.

Quigley & Quigley and Pirtle & Trabue, for appellants;  
J. W. Bush, C. C. Grassham, Molloy & Utley, and  
Andrew Scott, for appellee.

WHITE, J. Counsel for appellee has, by petition hearing, called our attention to certain expressions in our opinion as to the proper measure of damage, and the duty of the appellee when he was refused admittance into the hospital. The language used by us is probably not as clear as it should be, and may be open to criticism. In order to make our meaning in that regard, we respond to his petition by modifying or explaining the opinion rendered herein as follows:

When appellee was refused admission into the hospital, it then became his duty to use the care and prudence that an ordinarily careful person would use, when similarly situated, to prevent further injury or damage to himself. He is not bound to use the utmost care that any person might use, as counsel seems to think we held. He is bound only that a person of ordinary care and prudence would use to protect himself from injury when similarly situated. If the hospital had protected him, and yet he suffered loss and injury, the hospital would be liable to him for the reasonable cost of the medical service and attention he would have received at the hospital. This treatment he was entitled to receive, and the hospital was bound to render; and the cost of such service should be paid by the hospital.

\*See *Armistead v. Shreveport & R. R. Val. Ry. Co. (La.)*, 3 R. R. R. 868, 26 Am. & Eng. R. Cas., N. S., 868; *St. Louis S. W. Ry. Co. v. Texas (Tex. Civ. App.)*, 2 R. R. R. 187, 25 Am. & Eng. R. Cas., N. S., 187; *Bader v. Southern Pac. Co. (La.)*, 17 Am. & Eng. R. Cas., N. S., 60, and foot-note.



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appellee for the time he was not admitted to the hospital, whether he in fact obtained treatment elsewhere or not, if he used ordinary care of himself while not admitted into the hospital. Appellant did not undertake to cure all wounds, and is not an insurer of the persons of its employees, in life or limb; but it did agree to furnish medical care and attention, nursing and board, to its sick. This liability it must make good, by payment of the reasonable cost of such service for such time as the same was not furnished.

With this modification or explanation of the opinion heretofore rendered, the petition is overruled.

## SOUTHERN RY. CO. v. McLELLAN.

(Supreme Court of Mississippi, June 16, 1902.)

[32 So. Rep. 283.]

**Injury to Employee—Evidence—Declarations of Plaintiff.**

A flagman walking beside a moving train at night stumbled over a piece of slag beside the track, and fell, and was injured: *held*, that his statement just after the accident, that no one was to blame, while probably intended to express his opinion, merely, that the trainmen were not to blame, was admissible for such value as the jury might give it.

**Same—Evidence—Material Used for Ballast by Other Companies.\***

Where a flagman was injured by stumbling in the nighttime over a piece of slag beside the track, the roadbed being ballasted with slag, it was error not to permit defendant to show that other responsible railroads used slag to ballast their roadbeds.

**Same—Same.**

It was error to refuse to permit defendant to show that no accident had ever before happened at that place.

**Same—Same.**

It was error to permit plaintiff to show that he was performing extra duties, and that the train was short of hands, in the absence of any claim on his part that such fact was a contributory cause to the injury.

**Same—Same.**

It was error not to permit defendant's counsel to argue to the jury the long and safe use of the place since it was ballasted with slag.

**Same—Same—Plaintiff's Pecuniary Condition.†**

In an action by a servant against his master for injuries, it was error to permit plaintiff to show that he was poor.

Appeal from circuit court, Montgomery county; A. T. Roan, Special Judge.

"To be officially reported."

Action by Jesse McLellan against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Jesse McLellan, appellee, a young man about 20 years old,

\*As to a railroad company's duty to its employees with respect to constructing and maintaining roadbed, see foot-note appended to *Smith v. Erie R. Co.* (N. J.), 4 R. R. R. 793, 27 Am. & Eng. R. Cas., N. S., 793.

†See *Chicago R. I. & P. R. Co. v. Hambel* (Neb.), 2 R. R. R. 167, 25 Am. & Eng. R. Cas., N. S., 166; *Brunswick & W. R. Co. v. Wiggins* (Ga.), 22 Am. & Eng. R. Cas., N. S., 588, and foot-note.

was employed by appellant as a flagman, on one of freight trains, and had been so employed about 2½ years when the accident for which this suit is brought happened. On October 31, 1900, this train got into Greenville and got orders there to go out again that night. On going out, the train stopped at Huntington switch, a small switch near Greenville, to take from the switch there some cars in obedience to orders of the conductor of this train, and appellant assisted in making the switch, and the cars were brought from the switch to the main line; the switch was closed and appellee then closed a "knuckle" on the rear car, and gave the back-up signal, and proceeded on the outside of the track along the side of the roadbed, to make the coupling of a cabooses which had been left on the main line. It was while thus going along the track he stumbled over an obstruction, fell, and was thrown upon the track, and both his hands crushed so that they had to be amputated. Appellee testified, describing the accident: "In back of me I gave the back-up signal, and stepped on the rock with my left foot, and that threw me under the train; that I fell on my side under the left wheel." He also testified that the rock was, as near as he could get at it, very near as large as a man's head, at least as big as his double fist; that the rock was about a foot from the end of the cross ties. The court gave the following instruction for defendant: "The court instructs the jury that the mere fact that a railroad employee is injured by defects in machinery, ways, and appliances is not a bar to a recovery for injuries received by him on account of such defects." The giving of this instruction is assigned as error by appellant. The opinion of the court contains a statement of the facts. There was a verdict and judgment for plaintiff for \$20,000. Defendant's motion for a new trial was overruled, and it appeals.

S. M. Roane and Catchings & Catchings, for appellant.  
Hill & Session, for appellee.

TERRAL, J. Upon the trial of the case in the lower court the appellant offered several objections to the evidence which were overruled.

(1) It offered to show that the material used by it in ballasting its roadbed at Huntington switch, where the accident occurred, was like material as that commonly used by other railroad companies in ballasting their roads; and that the material was good. This was denied. (2) As a further circumstance relating to the question of negligence charged against it, it offered to show that no injury had ever occurred at Huntington switch on account of any defect in its way at that point; and that the material was also excluded. (3) The appellant objected to the testimony made by the plaintiff that he was poor; had no proper education; and no money. (4) It also objected to his evidence that as soon as he received his injury he was performing extra duty on the train being short of hands, though the injury is not

to have occurred in consequence thereof. (5) The defendant's counsel was denied the right to argue the want of any evidence of an injury along Huntington switch was a circumstance tending to show that the roadbed of the switch track was properly ballasted, to which he excepted. (6) And it complains that it was not permitted to prove that the plaintiff, shortly after his hurt, said to Dr. Toombs that no one was to blame for his injury, and that it was purely accidental. And in these several respects we think the appellant has reasonable ground of complaint.

The statement of McLellan to Dr. Toombs that his hurt (a sorely grievous one) was an accident, and no one was to blame for it, was probably intended to express his opinion that no one engaged in the operation of the train was to blame for it, and it perhaps did not relate to the question whether the roadway constituting Huntington switch was or not negligently constructed by reason of two large pieces of slag used in ballasting it; which is the gravamen of the complaint,—the servants of appellant being entitled to a reasonably safe roadway; yet the statement of a party hurt in relation to it, in a suit for damages therefor, is always admissible in evidence for such consideration and value as the jury may give it.

The offer of defendant to show that other responsible railway companies used slag to ballast their roads tended to rebut any inference that the defendant was negligent in the mere use of slag on its roadbed, and for this purpose that item of evidence was admissible, leaving to the jury the question whether the method of the use of the slag was negligence or not. For the common use of slag by them for ballast by other roads is an argument that the use of slag itself is not negligence. It is its character as applied, as large or small, that gives room to the consideration of negligence in its use. The rejected evidence related in some degree to the general question of negligence of the defendant company, and should have been received.

The offer of defendant to show that no accident had ever before happened at Huntington switch bore also, as we think, upon the same question. Wata. Dam. § 156.

The evidence that the train was short of hands should not have been admitted, as it is not insisted that that was a contributing element to the injury.

And we do not perceive the ground of denying appellant's counsel the privilege of arguing to the jury, as a circumstance in its favor, the long and safe use of Huntington switch by its trains after it had been ballasted with the slag in question.

That the plaintiff was poor was not a matter to be placed before the jury. Wata. Dam. § 620. As some, or all, of these errors may have entered into the finding of the jury, we have, after long reflection, concluded that the case should be reversed.

Reversed and remanded.



**ST. JOSEPH, ST. L. & S. F. RY. CO. v. SMITH et al***(Supreme Court of Missouri, Division No. 1, Nov. 26, 1900)*

[70 S. W. Rep. 700.]

**Mortgages—After-Acquired Property.**

Where a railroad company executed a mortgage on all of its property, including its railroad, made and to be made, its stations, station houses, depot grounds, and other property pertaining to the road now owned, possessed, or hereafter to be owned, possessed, acquired, and all real estate to which it might become entitled by reason of the construction of its road, such mortgage covered lands subsequently deeded to the mortgagor for a railroad right of way, railroad stock yards and grounds, which lands passed to the plaintiff on foreclosure of the mortgage.

**Right of Way—Adverse Possession.\***

Under Rev. St. 1899, § 4270, providing that nothing contained in any statute of limitations shall extend to any lands given, granted, or appropriated to any public use, a railroad cannot be deprived of its right of way by a conveyance of the land to a private party, conveyed to it for a right of way and for railroad stock yards and grounds, and so marked and designated on the plat of the land which it was located by adverse possession, though the land was occupied for railroad purpose during the adverse occupancy.

**Appeal from circuit court, Clinton county; A. D. Judge.**

Action by St. Joseph, St. Louis & Santa Fe Railway Company against Daniel Smith and others. From a judgment in favor of defendants, plaintiff appeals. **Reversed.**

Lathrop, Morrow, Fox & Moore, for appellant.

E. C. Hall, for respondents.

**MARSHALL, J.** This is an action in ejectment for a certain parcel of land in the town of Gower, in Clinton county, Mo., described in the petition as follows: "Beginning at a point 71 feet north of the northwest corner of lot 12, in block 13, in the town of Gower, in said county and state; thence north 71 feet to an old fence; thence eastwardly along said fence 185 feet to stock yards fence; thence south 91 feet to block 14, 30 feet north of block 14 in said town of Gower; thence east 178 feet to place of beginning." The suit was begun April 2, 1898. The petition is in the usual form, and the answer is a general denial. The circuit court directed a verdict for the defendant, and the plaintiff appealed. During the appeal the defendant died, and the cause has since been properly revived in this court against his heirs, John Smith, Elias T. Smith, Sarah E. Quinn, wife of G. W. Quinn, Byrda Sadowsky, wife of John Sadowsky, Wm. D. Sadowsky, Alfred Smith, Aden Smith, Henry C. Smith, and Daniel Smith.

\*As to whether title by adverse possession can be acquired by a railroad company to lands originally acquired by it for railroad purposes, see foot-note appended to *Graham v. St. Louis, etc.*, (Ark.), 1 R. R. R. 527, 24 Am. & Eng. R. Cas., N. S., 527; 100 App. 1, appended to *McLemore v. Memphis & C. R. Co.* (Tenn.), 4 R. R. R. 810, 27 Am. & Eng. R. Cas., N. S., 801.

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1. Daniel Smith, the original defendant, is the common source of title. The plaintiff claims title by mesne conveyances from said Daniel Smith, and the defendant shows no record title, but claims title by limitation. The defendant challenges the plaintiff's record title, and claims that it has no title whatever, and the plaintiff denies that the defendant has or could have any title by limitation, inasmuch as the property has been and is appropriated to a public use, to wit, use by a railroad company, and therefore is exempt from the operation of the statute of limitations by the express provisions of section 4270, Rev. St. 1899. The defendant has been in the actual possession of the premises for a sufficient length of time to claim title by limitation, and is entitled to maintain such possession unless no title by limitation could be acquired to the premises while so appropriated to such public use. The plaintiff's title arises in this wise: On the 2d of November, 1868, the St. Louis & St. Joseph Railroad Company executed a mortgage to the Farmers' Loan & Trust Company of New York, which covered all its property, right of way, rights, privileges, and franchises, and, further, expressly making the following provision: "And including its railroad, made or to be made, its track, laid or to be laid, its stations or station houses, depot grounds, rails, fences, bridges, and all other belongings or structures, as well as engine houses or machine shops, rolling stock, and other property pertaining to said railroad now owned, or possessed, or acquired, or hereafter to be owned, possessed, or acquired, and all lands or real estate to which the said party of the first part may become entitled through or by reason of the construction of the said railroad, together with all and singular the rights and privileges and corporate property and franchises of said railroad company, and all the appurtenances to the above-described premises belonging or in any wise appertaining." Thereafter, on the 18th of March, 1874, this mortgage was foreclosed, and S. Angier Chase became the purchaser at the trustee's sale, and on the 15th of June, 1874, he conveyed the property to a new corporation, called the St. Joseph & St. Louis Railroad Company, and thereafter, on the 1st of January, 1888, that company conveyed the property to the plaintiff company. At the date of the mortgage by the St. Louis & St. Joseph Railroad Company to the Farmers' Loan & Trust Company, to wit, November 2, 1868, the mortgagor did not own the property in controversy here, but thereafter, on September 3, 1870, by a general warranty deed, Daniel Smith and wife conveyed the property to the St. Louis & St. Joseph Railroad Company, it being a part of a larger piece of property conveyed for a railroad right of way, and the part in question being designated on the plat of the town as "Railroad Stock Yards and Grounds." The first proposition, therefore, is whether this after-acquired property passed by the mortgage of the St. Louis & St. Joseph Railroad



Company, which was made prior to the acquisition of the property. It will be observed that the mortgage contained an after-acquired property clause, and that this after-acquired property was secured between the date of the mortgage and the foreclosure of the mortgage. The principles of law applicable to such a case as this passed into adjudication in this court in *Omaha & St. L. Ry. Co. v. Wabash, St. L. Ry. Co.*, 108 Mo. 298, 18 S. W. 1101, 50 Am. & Eng. 700. It was there held, in an able opinion by Black, that an after-acquired property clause in a mortgage was valid and was sufficient to pass the title to such after-acquired property by the foreclosure of the mortgage. It will be noted in addition, that in that case the property in controversy was a part of the right of way, depot grounds, side tracks, etc., of the railroad company, but was a hotel, which was purchased and run by the railroad company for an eating house to accommodate the employees of the company and passengers and others, and that it was nevertheless held to be an incident appurtenant to the operation of the road. Counsel for the plaintiff have supplemented this case by reference to the *Trust Co. v. Kneeland*, 138 U. S. 414, 11 Sup. Ct. 352, 17 Ed. 1014, *Dunham v. Railroad Co.*, 1 Wall. 254, 17 L. Ed. 584, and *Pennock v. Coe*, 23 How. 117, 16 L. Ed. 436, in all of which the same doctrine is announced. The doctrine so announced falls within the general rule of law applicable to after-acquired property passing by virtue of a prior deed whenever the description in the deed is comprehensive enough to embrace it. The particular property in controversy lies within the boundaries of the property specifically described in the deed from Daniel Smith and wife to the St. Louis & St. Joseph Railroad Co., dated September 3, 1870. That deed expressly refers to this piece of property as a part of the premises, and makes the south line of this property a part of the southern line of the larger piece of property covered by the grant, and, in addition, refers to the fact that this property is marked on the plat of the town as "Railroad Stock Yards and Crossings." In fact, it is marked on the plat as "Railroad Stock Yards and Grounds," but its identity is established by the fact that it lies north of block No. 1 of the town and northwest of the public square. But, aside from this, the after-acquired property passed by the mortgage in force of section 4591, Rev. St. 1899. Under these circumstances the legal conclusion follows that the plaintiff has a good and sufficient record title to the property.

2. The only remaining question is whether the defendant, Daniel Smith, has acquired title to the property by limitation. There is no question that the defendant, by himself and by claiming under him, has had the actual possession of the property for a time sufficiently long to confer title by prescription, if such a title can be acquired as to this property by the railroad company. The property is a part of the

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and running through the town of Gower, and marked on the plat of the town as "Railroad Right of Way," "Railroad Stock Yards and Grounds." It lies adjacent to the "railroad right of way," and is as much a necessary and proper appurtenant to the operation of a railroad as depot grounds are, for it is the depot for the loading and unloading of stock. It therefore falls within the rule laid down in *Omaha & St. L. Ry. Co. v. Wabash, St. L. & P. Ry. Co.*, 108 Mo. 298, 18 S. W. 1101, 50 Am. & Eng. R. Cas. 700. The case is almost identical with the essential facts involved in *Railroad Co. v. Atman*, 149 Mo. 657, 51 S. W. 412, and the principles of law so clearly and forcibly stated by Valliant, J., speaking for this court, in that case, apply with full force to this case. It is held in that case that, while the statute of limitations applied to a railroad company generally, it did not apply to property owned by a railroad company, and devoted to use as right of way, depot, or station grounds, for such property so devoted was appropriated to a public use, within the meaning of section 6772, Rev. St. 1889 (section 4270, Rev. St. 1899), and was, therefore, exempted from the operation of the statute of limitations by virtue of that section of the statutes. The research of counsel for appellant developed the fact that the conclusion so reached by this court in that case is in perfect consonance with similar cases in other jurisdictions. *Slocumb v. Railroad Co.*, 57 Iowa, 675, 11 N. W. 641; *Railroad Co. v. French* (Tenn. Sup.) 43 S. W. 771, 66 Am. St. Rep. 752; *Railway Co. v. Telford's Ex'rs* (Tenn. Sup.) 14 S. W. 776, 10 L. R. A. 855; *Fox v. Hart*, 11 Ohio, 414. The fact is emphasized in these cases that the railroad is not cut off from its right to claim that such land is appropriated to a public use, because it had not previous to the controversy actually used it for a right of way, depot grounds, etc.; for it was pointed out that, if the land was within the designation, the company was not obliged to actually occupy it until it became necessary or desirable for it to do so, and that any one who enters upon land so owned by a railroad company and erects improvements thereon does so at his peril, and is affected with notice of the rights of the railroad to such land, and that no possession can be adverse to the railroad, or be made the basis of a title by prescription as against the railroad, no matter how long that possession may continue. These are the logical and necessary consequences flowing from the constitution of this state in reference to property so held by railroads for such uses, as was pointed out by this court in *Thompson v. Railway Co.*, 110 Mo. loc. cit. 160, 19 S. W. 77.

It follows that the defendant has no title whatever to the land in controversy, but that the plaintiff has a good and sufficient title thereto, and is entitled to the possession thereof. The judgment of the circuit court is therefore erroneous, and is therefore reversed, and the cause remanded to be proceeded with in accordance herewith. All concur.

**GEORGIA R. & BANKING CO. *et al.* v. MADDOX *et al.***

(*Supreme Court of Georgia, Aug. 9, 1902.*)

[42 S. E. Rep. 315.]

**Lease of Franchises—Authority to Maintain Terminal Yards of Lessee.**

Under the charter of the Georgia Railroad & Banking Company, and the amendment thereto, it had lawful authority to lease its franchises as to the transportation of both freight and passengers, to and from such points as it might determine, and in such franchises were included all rights and privileges necessary for conducting the business for which the company was incorporated, among which was the right to maintain yards at terminal points for the manipulation of trains. Such franchises of the company were leased, to the Louisville & Nashville Railroad Company, and to the other defendants. The Louisville & Nashville Railroad Company had lawful power to lease part of the right of way of the Georgia Railroad & Banking Company, in Atlanta, to the Atlanta Belt Line Company, to be used as a terminal yard. The charter of the Atlanta Belt Line Company authorized it to accept from the Louisville & Nashville Railroad Company, as lessee of the Georgia Railroad & Banking Company, the right to use such terminal yard.

**Same—Authority to Accept Lease.**

The Atlanta Belt Line Company had the statutory power to lease road, property, and franchises to the Atlanta & West Point Railroad Company, and the latter company had, by its charter as amended, the right to accept such lease.

**Traffic Contract—Validity.**

The traffic contract entered into between the Atlanta & West Point Railroad Company and the Louisville & Nashville Railroad Company, under the terms of which each of these companies acquired the right to use certain property of the other in the city of Atlanta, to facilitate the transportation of freight, was legal.

**Nuisances—Use of Terminal Yard.\***

Where a railroad terminal yard is located, and its construction is authorized, under statutory powers, if it be constructed and operated in a proper manner, it cannot be adjudged a nuisance. According to the facts and circumstances, and the inconveniences to persons residing near such a yard, from the operation of locomotives, rumbling of cars, vibrations produced thereby, smoke, cinders, soot, and the like, which result from the ordinary and necessary, therefore proper, use and operation of such a yard, are nuisances, but are the necessary concomitants of the franchise. The terminal yard the operation of which is sought to be enjoined in this case was located, and its operation authorized, under statutory powers.

**Same—Same.**

A railroad terminal yard, though authorized by statute, may become a nuisance by improper construction, or by subsequent improper operation.

**Same—Same—Right to Enjoin—Sufficiency of Evidence.**

Though the evidence in this case, both as to construction and operation, was conflicting, the granting generally of the injunction was erroneous; for properly interpreting the language used in the complaint, and the evidence filed by the trial judge, in the light of the strong and decided preponderance of testimony showing that the construction of the yard on the grade was proper, it is manifest that he did not grant the injunction solely because the yard was not laid out upon a level. This was the effect of the injunction being to entirely prevent even the

\*See monograph appended to *Jenkins v. Pennsylvania R. Co.* 2 R. R. R. 210, 25 Am. & Eng. R. Cas., N. S., 210.



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carrying on of a lawful business, instead of pointing out and restraining particular acts which, because unnecessary or unlawful, were nuisances, the judgment excepted to cannot be upheld; and moreover, save as to operations on the Sabbath, there was no evidence sufficiently clear and distinct to enable the court to designate any such acts as those just indicated, and specifically enjoin the commission of the same.  
(Syllabus by the Court.)

Error from superior court, Fulton county; Geo. F. Gober, judge.

Action by J. E. Maddox and others against the Georgia Railroad & Banking Company and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Jos. B. & Bryan Cumings, Sanders McDaniel, Dorsey, Brewster & Howell, and King & Spalding, for plaintiffs in error.

H. E. W. Palmer, G. L. Bell, and B. H. Hill, for defendants in error.

FISH, J. The record shows that 24 residents and owners of dwelling houses at Inman Park, in the eastern portion of the city of Atlanta, and the trustees of 2 churches located there, filed a petition, with various amendments thereto, for an injunction against the Georgia Railroad & Banking Company, the Louisville & Nashville Railroad Company, and the Atlanta & West Point Railroad Company, to restrain the operation of a terminal yard, located on the right of way of the first-named company, adjoining Inman Park. The grounds upon which the injunction was sought were that such yard and the manner in which it was conducted was a nuisance, and that the damage resulting therefrom to the petitioners was special and irreparable. Inman Park was laid out in 1887 and 1888 as a residential, church, and school site, upon which valuable residences and churches were soon afterwards erected, and the park can be used for no other purposes. This park is bounded on its entire southern frontage by the right of way, 200 feet wide, of the Georgia Railroad & Banking Company. This company was incorporated, in 1833, as the Georgia Railroad, and its name changed to the Georgia Railroad & Banking Company by an amendment to its charter in 1835. Its railroad franchises, roads, rolling stock, etc., were leased to William M. Wadley and his assigns in 1881, and the Louisville & Nashville Railroad Company became the lessee through an assignment of the Wadley lease. On October 17, 1899, the Atlanta Belt Line Company was incorporated, under the general railroad law of this state, to construct a steam railroad from Oakland City, on the Atlanta & West Point Railroad, to a point on the Georgia Railroad at or near the eastern corporate boundary of the city of Atlanta. The road was so built. Its western terminus was about two miles west of the eastern terminus of the Atlanta & West Point Railroad, and its eastern terminus was about one mile and three-quarters east of the western terminus of the Georgia



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Railroad. On November 30, 1900, the Louisville & Nashville Railroad Company leased to the Atlanta Belt Line Company a part of the right of way of the Georgia Railroad & Banking Company, at the junction of the two roads, for terminal facilities; and it is upon this leased land that the terminal yard in question is now located. On September 12, 1900, the Atlanta & West Point Railroad Company, which was incorporated by the legislature before the enactment of the general railroad law of this state, had its charter amended so as to include certain parts of the provisions of the general railroad law. First. The sixth paragraph of section 2167 of the Civil Code, which reads as follows: "To cross, intersect, or join any of its railroads with any railroad heretofore or hereafter constructed, at any point in its route, or upon the ground of any other railroad company, with the necessary tracks, sidings and switches, and any other conveniences necessary in the construction of said road, and may run over any part of any railroad's right of way necessary or proper to reach a freight-depot, in any city, town or village through which said railroad may run." Second. The 2173d section of the Civil Code, the power given by this section being to lease or purchase the property of any other such company, to hold, use, and occupy the same in such manner as the company deem most beneficial to their interest." Third. The 2174th section, by which plaintiffs in error claim the Atlanta & West Point Railroad Company was empowered to purchase the property and franchises of any other railroad company whose railroad shall connect with, or form a continuous line or system with, the railroad of such company, upon such terms as may be agreed upon. On November 30, 1900, the Atlanta & West Point Railroad Company leased the Atlanta Belt Line with all its rights, property, and franchises, including that part of that part of the right of way of the Georgia Railroad & Banking Company upon which the terminal yard in question is located. The Atlanta & West Point Railroad Company began its transportation business over the Atlanta Belt Line and its use of the terminal yard, on or about January 1, 1901. Under a traffic contract between the Louisville & Nashville Railroad Company and the Atlanta & West Point Railroad Company, the latter was granted the joint use of the Georgia Railroad & Banking Company's terminals in and near Atlanta, and of its offices, station buildings, freight depot, coal sheds, water tanks, platforms, and yards, and the Atlanta & West Point Railroad Company granted to the Louisville & Nashville Railroad Company the equal use, in common, of its houses and grounds near Decatur and Butler streets, its warehouse near Loyd street, and its tracks and terminals on the right of way of the Georgia Railroad & Banking Company, at and near Inman Park.

The petition for injunction, and the amendments thereto, aver that the original lease of the Georgia Railroad & Banking

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ing Company to William M. Wadley was void because unauthorized by that company's charter; that, for the same reason, the lease by the Louisville & Nashville Railroad Company of the part of the right of way of the Georgia Railroad to Banking Company to the Atlanta Belt Line for terminal facilities was void; that there was no physical connection between the Atlanta & West Point Railroad and the Georgia Railroad, as the eastern terminus of the former road was at Nelson street bridge, in the western part of the city of Atlanta, and the western terminus of the Georgia Railroad was in the center of the city; and that, therefore, the terminal yard at Inman Park was located in a place not authorized by law, which made it a nuisance per se. The petitioners also contended that the yard could be located on the Atlanta Belt Line where there were no residences; that the yard as constructed was partly on a steep grade, which intensifies the noises from locomotives and moving trains, and increases the volumes of smoke and cinders that are cast into their houses; that work in this terminal yard, which consisted of dissecting trains and switching cars and making up and moving off freight trains by inefficient and overloaded engines, was carried on almost unremittingly every day and night, including Sundays; and that these annoyances, with the unnecessary blowing of whistles, ringing of bells, and screaming of trainmen produced irreparable injury to their property, and made comfort in the daytime and sleep at night almost an impossibility to themselves and the members of their families. The petitioners submitted affidavits tending to support the various averments and contentions made in their pleadings.

The defendants answered that the terminal yard was located in pursuance of statutory powers, was skillfully and properly constructed, and caused less noise and inconvenience, in switching cars and other work thereon, than if it had been entirely on a level grade, and was not negligently or injuriously operated in any respect. These averments were supported by affidavits and other documentary evidence. The judge of the court below granted a preliminary injunction on July 13, 1901, restraining the use of the terminal yard altogether on and after October 1, 1901, and until that date enjoined its use, as much, on Sundays and between the hours of 9 p. m. and 6 a. m. on other days. The defendants excepted to the grant of such injunction, and just before he certified the bill of exceptions presented by the defendants, on August 1, 1901, the judge modified such injunction so that the same, "without reserve, is suspended after the first of October [1901] until the remittitur is entered, and shall not take effect until five [5] days after entry of the remittitur from the supreme court, in the event such judgment is affirmed. The restraint from switching as granted in said order of July 13th, 1901, on Sundays and from 9 p. m. to 6 a. m. on other days, will continue until said injunction without reserve goes into effect."

1. The Atlanta Belt Line Company was incorporated under the general railroad law of this state. Its eastern terminus, according to its charter, was to be at a point on the Georgia Railroad at or near the eastern corporate boundary of the city of Atlanta. This gave it a large discretion in selecting the point for such terminus, and the company's exercise of such discretion "will not be revised unless it has clearly exceeded its limits or acted in bad faith" (3 Elliott, R. R. § 919, p. 1264; Fall River Iron Works Co. v. Old Colony & F. R. R. Co., 5 Allen, 221); and such revision, whatever might be the private remedies of individuals to prevent the location at the point selected, cannot be made, certainly, in a collateral proceeding, after the completion of the work (Railroad Co. v. Speer, 56 Pa. 325, 94 Am. Dec. 84). The Atlanta Belt Line Company possessed the statutory power to acquire by condemnation, purchase, or lease any land necessary for its terminal facilities at its eastern terminus. Civ. Code, § 2167, par. 3. And, when terminal yards are necessary, they must be provided by a railroad to facilitate its business of transportation. 4 Elliott, R. R. § 1479. It acquired the land needful for this purpose on a part of the right of way of the Georgia Railroad & Banking Company, by lease from the Louisville & Nashville Railroad Company, which was, and still is, the sublessee of the Georgia Railroad & Banking Company. To make this lease valid, the lessor must have had the power to make the lease, and the lessee the power to accept it, for if the lease was beyond the power of either, it was as invalid as if beyond the power of both. St. Louis, V. & T. H. R. Co. v. Terra Haute & I. R. Co., 145 U. S. 393, 402, 12 Sup. Ct. 953, 36 L. Ed. 748; 2 Elliott, R. R. §§ 430, 432. See, also, Central R. & Banking Co. v. Mayor, etc., of Macon, 43 Ga. 644. The Atlanta Belt Line Company, as shown above, had the statutory power to accept the lease. The question then arises, did the Louisville & Nashville Railroad Company possess the power to make the lease? The Georgia Railroad & Banking Company was leased to William M. Wadley and his assigns on May 7, 1881, and an assignment of this lease was duly procured by the Louisville & Nashville Railroad Company, and the Georgia Railroad & Banking Company has ever since acquiesced in the subletting by Wadley. By such acquiescence, the Georgia Railroad & Banking Company occupies the same position as if it had originally leased directly to the Louisville & Nashville Railroad Company. Moreover, if the charter of the Georgia Railroad & Banking Company confers the power of leasing in the manner above referred to, then such power passed, as a part of the franchise, to the lessee, in the absence of any restricting clause or provision in the lease. See 19 Am. & Eng. Enc. Law (1st Ed.) 897. The sections of the charter of the Georgia Railroad & Banking Company applying to the power of leasing are section 13 (Acts 1833, p. 262) and section 14 (Acts 1833, p. 263). Section



12 is as follows: "That the said Georgia Railroad Company shall *at all times* have the exclusive right of transportation or conveyance of persons, merchandise or produce, over the railroad and railroads to be by them constructed, *while they see fit to exercise the exclusive right; provided that the charge of transportation or conveyance shall not exceed fifty cents per hundred on heavy articles, and ten cents per cubic foot on articles of measurement, for every one hundred miles; and five cents per mile for every passenger: provided always, that the said company may, when they see fit, rent or farm out all or any part of their said exclusive right of transportation or conveyance of persons on the railroad or railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned. And the said company in the exercise of their right of carriage or transportation of persons or property, or the persons so taking from the company the right of transportation or conveyance, shall, so far as they act on the same, be regarded as common carriers.*" (Italics ours.) And section 14 provides: "That whenever the company aforesaid shall see fit to farm out *as aforesaid*, to any person or persons, or body corporate, *any part of their exclusive right of conveyance and transportation,*" (Italics ours), they may provide for the character of the locomotives and cars that the lessee shall use. It is violative of all rules of interpretation to select one sentence or clause of a section in a charter, and shut one's eyes to the rest of the section, with the view of getting the sense of the whole section. And it is equally unwarranted to pass over altogether a succeeding section which contains words conclusively showing a direct reference to and connection with a prior section on the same subject-matter. "Special charters and general incorporation laws are, like other legislative acts, within the rule that, in construing a statute, the whole act must be looked into, and all its parts harmonized if possible." 7 Am. & Eng. Enc. Law 2d Ed.) 713. It is true, as was said in the case of Railroad v. Smith, 70 Ga. 700, that the powers given to a corporation must appear in its charter in plain words or by necessary implication, and that all reasonable doubts shall be resolved, against the corporation, in favor of the public. This is but an iteration of an oft-repeated principle. "The true meaning of the doctrine is that grants to corporations are construed most favorably to the public when there exists a reasonable doubt as to the extent of the privileges conferred. But it does not follow from this that such a grant is to be construed so strictly as to wrest the meaning of words from their common and well-understood significance; but such a grant, like every other instrument, public or private, is to be construed according to the plain meaning of the words, where they are free from ambiguity and doubt." 4 Thomp. Corp. § 5345.

Now, let us construe sections 12 and 14 of the charter of the



Georgia Railroad & Banking Company according to law, which requires it to be done without beginning and ending in the middle of either section, or arguing in a circle. In the first place, the company has at all times the exclusive right of transportation or conveyance of persons or property, "while they see fit to exercise the exclusive right." If they do not see fit to exercise it after possessing it, the necessary implication is that they would or could farm it out in whole or in part. This conclusion passes from the state of a necessary implication to that of an express grant to lease such right, upon a consideration of the subsequent words in the same section, and by connecting and construing this part of section 12 with section 14, as we will show further on. Next, there are two rates specified for the transportation of two classified species of property, and one single rate for the conveyance of persons. Then immediately follows the right of the company, when they see fit, to farm out to any person or persons, or other company, the whole or any part of their exclusive right of transportation or conveyance of persons on the railroad or railroads, with the privileges, for such term as may be agreed on. Almost an identical right as is given by these words alone is found in the charter of the Monroe Railroad Company, granted in 1833 (Acts 1833, p. 243), and the words were construed in the case of Central R. & Banking Co. v. Mayor, etc., of Macon, 43 Ga. 605, to confer upon the company the right to lease its road, in whole or in part, for the transportation of persons and property. Such leasing by the Georgia Railroad Company is to be "subject to the rates above mentioned." The word "rates" here clearly relates to the charges fixed for the transportation of property and the conveyance of persons, for there is only one rate as to passengers; and hence the power to lease in whole or in part, the exclusive right of transportation of property, is thus further shown by express and apt words. Again, the company while exercising its "right of carriage or transportation of persons or property, or the person so taking [leasing] from the company the right [such right] of transportation or conveyance shall be regarded as common carriers." These words show that the lessee of the company, as well as the company itself, while exercising the rights conferred, would be a common carrier, with the "right of carriage or transportation of persons or property." And in section 14 the power is expressly given to the Georgia Railroad Company, when it sees fit, to farm out as aforesaid (that is, as specified in section 12), to any person or persons, or other company, "any part of their exclusive right of conveyance and transportation." Such "exclusive right of conveyance and transportation" is expressly stated in section 12 to be the "exclusive right of transportation or conveyance of persons, merchandise and produce over the railroad or railroads to be by them constructed."

The act of December 18, 1835 (Acts 1835, p. 180), amending

the charter of the Georgia Railroad Company, besides changing its name to the Georgia Railroad & Banking Company, empowered it "to have, purchase, receive, possess, enjoy and retain to them and their successors, lands, rents, tenements, hereditaments, goods, chattels and effects of whatsoever kind, nature or equality the same may be, sufficient for the construction of banking houses and the erection of the railroad only, and the same to sell, grant, demise, alien or dispose of." The word "demise," used in the enumeration of the powers of the company under this amendment, means, technically, to lease for a term of years. 5 Am. & Eng. Enc. Law (2d Ed.) 538. Thus, by express words which do not admit of any reasonable doubt, the charter of the Georgia Railroad & Banking Company clearly confers the power to lease its exclusive right of transportation of property or conveyance of persons, in whole or in part, to any person or persons, or other company, and for such term as may be agreed upon. See, also, the following cases bearing on the right of the Georgia Railroad & Banking Company to exercise such power of leasing: *Arnold v. Banking Co.*, 50 Ga. 304; *Banks v. Banking Co.*, 112 Ga. 655, 37 S. E. 992. It is contended by the defendants in error that "all right" of the Georgia Railroad & Banking Company "to lease anything" expired in 36 years, and, therefore, it had no power to make the lease to Wadley in 1881; and section 15 of the charter of the company is cited in support of this contention. It seems to us that the mere reading of this section shows that this contention is not sound. The section provides: "That the exclusive right to make, keep up and use the railroads and transportations authorized by this act, shall before and during the term of thirty-six years, to be computed from the time when the said road from Augusta to either of the points hereinbefore designated, shall be completed for transportation. \* \* \* And after said term of thirty-six years shall have elapsed, though the legislature may authorize the construction of other railroads, for the trade and intercourse contemplated herein; nevertheless, the Georgia Railroad Company shall remain incorporate, and vested with all the estate, powers and privileges as to their own works herein granted and secured, except the exclusive right to make, keep up and use railroads over and through such parts of the country, that shall so have expired by the foregoing limitation." Construing these two sentences together, it is evident that the intention of the general assembly was that, until the period of 36 years therein provided for had expired, the company chartered by this act should have "the exclusive right to make, keep up and use" railroads between certain points designated in the charter, and that the legislature should have power, during this period, to authorize any other company or person to construct and operate any other railroad, or railroads, between such points; but, after the expiration of this period, the legislature might "authorize the construction of other railroads for the trade

and intercourse contemplated" by the act; and that even when the designated period of 36 years should have elapsed, and when other railroads had been constructed, under legislative authority, between these points, the Georgia Railroad Company should, nevertheless, remain incorporate, and be "vested with all the estate, powers and privileges as to their own works" granted by the charter, "except the exclusive right to make, keep up and use railroads over and through [the] parts of the country" in which the act granted such company the exclusive privilege of so doing for the term of 36 years from the time the road was completed from Augusta to any of the other points designated in the charter. That this is the meaning of this fifteenth section is very clear when we take into consideration the provision that, after the expiration of the limitation period, the company was to remain a corporation, and to be "vested with all the estate, powers and privileges as to their own works" granted and secured in the act. When the period of limitation should be completed, all the estate, powers, and privileges of the company, as to its own works, granted and secured by the act were to remain in full force and effect, but the right to prevent the construction and operation of other works of a like character within its hitherto exclusive territory was to terminate. If the company, after the lapse of the 36 years, was "to be vested with all the estate, powers and privileges as to their own works herein granted and secured, except the exclusive right to make, keep up and use railroads over and through such parts of the country," we cannot conceive what right, power, or privilege granted by the charter, save the right to prevent the construction and operation of competing railroads in the territory designated, the Georgia Railroad & Banking Company lost by the completion of the period of limitation. If, at the completion of such period, it was still to survive as a corporation, and to be vested with all the estate, powers, and privileges as to its own works except the exclusive privilege indicated, it was, when the 36 years had expired, still vested with the power to lease its road, franchises, etc., to any individual, or individuals, or other company.

It follows from the foregoing that the lease of the Georgia Railroad & Banking Company to William M. Wadley, in 1881, was legal; that he had the power to assign the right thus acquired; and the present lessee or assignee of that right, namely, the Louisville & Nashville Railroad Company, possessed the power to lease a part of the right of way of the Georgia Railroad & Banking Company to the Atlanta Belt Line Company for the latter's terminal facilities.

2. The Atlanta Belt Line Company also possessed the statutory power to lease its road, property, and franchises to another railroad company with whose road its own connected or formed a continuous line. Civ. Code, § 2179. It made such lease, on November 30, 1900, to the Atlanta & West Point



Railroad Company, with whose line its own connected at Oakland City, in Fulton county, about two miles west of the eastern terminus of the Atlanta & West Point Railroad, and thus formed a continuous line from Oakland City eastward. Did the Atlanta & West Point Railroad Company have the statutory power to accept this lease? On September 11, 1900, its stockholders, to the end that it might be legally authorized to purchase or lease the Atlanta Belt Line road, duly and regularly adopted, by a large majority vote, the resolutions that its charter be amended by adopting the provisions of the general act for incorporating railroads, as contained in section 2167 (6), 2173, and 2179 of the Civil Code. Accordingly, on September 12, 1900, the charter was amended, under section 1840 of the Civil Code, so as to make the provisions of such sections a part of the same. On October 18, 1900, at an annual meeting of the stockholders of the company, a resolution was unanimously adopted which, after reciting that the charter of the company had been amended, granting it power to buy or lease the Atlanta Belt Line Railroad, authorized and empowered the board of directors of the Atlanta & West Point Railroad Company to buy or lease the Atlanta Belt Line Railroad, if they should deem such action advisable; the terms of the purchase or lease being left by the resolution to the wise discretion of the board. The lease, as we have seen, was made on November 30, 1900. It is true, as was ruled in *Alexander v. Railroad Co.*, 108 Ga. 151, 33 S. E. 866, that these amendments to the charter of the Atlanta & West Point Railroad Company, being fundamental, radical, and vital, to be valid should have been based on the unanimous consent of the stockholders. We think, however, that the resolution adopted by a unanimous vote of the stockholders on October 18, 1900, reciting that the amendments had been made, and empowering the board of directors to buy or lease the Atlanta Belt Line road, was such an acceptance and ratification of the amendments, by all the stockholders, as operated to legally make the amendments part of the charter of the company, just as if the unanimous consent of the stockholders had been obtained prior to securing the amendments. See 7 Am. & Eng. Enc. Law (2d Ed.) 682, and note 1, where it is said: "The general rule as to the acceptance of amendments to charters is that acts of user under an amendment to a corporate charter for which no authority can be found except in such amendment, and which amendment is supposed in good faith to be beneficial to the corporation, are evidence of an acceptance of such amendment by the corporation, and make it the law of the corporation, and binding upon all its members;" citing *Railroad Co. v. Zimmer*, 20 Ill. 654; *Foster v. Bank*, 16 Mass. 245, 8 Am. Dec. 135. See, also, *Railroad Co. v. Cole*, 29 Ohio St. 126, 23 Am. Rep. 729. In 2 Elliott, R. R. § 446, that author says: "In some of the states the statutes grant a right to lease to connecting lines. \* \* \* It is held



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that under such a statute it is not essential to the validity of a lease that the leased road shall be an extension from either terminus of the main line, but it may be merely a collateral branch forming a continuous road, by way of the junction, to either terminus of such main line, in as direct a route as the average railroad. The pivotal question under such statutes is whether the line to which the lease is executed is a connecting line." *Hancock v. Railroad Co.*, 145 U. S. 409, 12 Sup. Ct. 969, 36 L. Ed. 755. Our general railroad law authorizes one railroad company to lease its road, etc., to another company with whose road "it shall connect or form a continuous line." Civ. Code, § 2179. When enacting such law, the legislature manifestly had in view and meant a connecting line of railroad as then defined in our Code. The definition of a connecting line is found in sections 2212 and 2213 of the Civil Code, which are the same as sections 719 (q) and 719 (r) of the Code of 1882. These sections were construed in *Logan v. Railroad*, 74 Ga. 693, 694, as follows: "Section 719 (q) declares the connecting line to be any line 'at the terminus, or any intermediate point'; and section 719 (r) describes the connecting line by prescribing that 'where any railroad, in this state, joins another at any point along its line, or where two of such roads have the same terminus, either line having the same gauge may, at its own expense, join its track by proper and safe switches.' So that it must be only an adjacent road capable of being joined by switch to the other, and this may be at the terminus or anywhere on the line where they meet or converge or connect, at village or depot or city." The Atlanta & West Point Railroad and the Atlanta Belt Line were, therefore, connecting lines at the time of the latter's lease to the former. By this lease, the Atlanta & West Point Railroad Company succeeded to all the rights, property, and franchises of the Atlanta Belt Line Company, among which was the leasehold to that part of the right of way of the Georgia Railroad & Banking Company upon which the terminal yard, the subject-matter of this litigation, is located. And the Atlanta & West Point Railroad thus became a connecting through line with the Georgia Railroad, because the Atlanta Belt Line connected, at its eastern terminus, with the Georgia Railroad. This legal conclusion is clear, for the Atlanta & West Point Railroad Company is as much a common carrier over the Atlanta Belt Line, leased by it, as over its own line. *Logan v. Railroad*, 74 Ga. 685 (4).

3. After this connection of the Atlanta & West Point Railroad with the Georgia Railroad, and the location and construction of the terminal yard, had been secured under statutory powers, the Atlanta & West Point Railroad Company and the Louisville & Nashville Railroad Company entered into a mutual traffic contract, by which the Atlanta & West Point Railroad Company was granted trackage rights over the right of way of the Georgia Railroad & Banking Company,

into Atlanta, and the joint use of the depot, warehouses, yard, offices, and other railroad appurtenances of the Georgia Railroad & Banking Company in the city; and the Louisville & Nashville Railroad Company was granted the joint use of property held by the Atlanta & West Point Railroad Company in the city, and also of the terminal yard at or near Inman Park. This contract facilitated, not only the transportation of freight to the consignees of the Atlanta & West Point Railroad Company in Atlanta, but shipments from Atlanta westward over the Atlanta & West Point Railroad, and eastward over the Georgia Railroad, and also through shipments, eastward and westward, over both roads. Instead, therefore, of disabling either road to transact its own business, the facilities of each road for the transportation of freight were thus materially increased, and the general public correspondingly benefited. The law upholds such a contract. 1 Elliott, R. R. § 42; 2 Elliott, R. R. §§ 356, 357, 358, and cases cited. See *Banking Co. v. Friddell*, 79 Ga. 489, 7 S. E. 214, 11 Am. St. Rep. 444.

4. From what we have said above, it is seen that the terminal yard, the operation of which the defendants in error seek to enjoin, was located, and its construction authorized, under statutory powers. In such cases the general rule, supported practically by an almost unbroken line of authorities, is that a work so located and constructed, if constructed and operated in a proper manner, cannot be adjudged a nuisance. This applies with special force to works thus authorized to facilitate transportation on railroads, which are of a quasi public nature. 19 Am. & Eng. Enc. Law (1st Ed.) 923, 924, and notes; 4 Wait, Act. & Def. p. 784; 2 Elliott, R. R. § 718, and note; 1 Wood, R. R. § 212; 2 Wood, Nuis. § 753; 1 High, Inj. (3d Ed.) § 767; *Vason v. Railroad Co.*, 42 Ga. 631; *Burrus v. City of Columbus*, 105 Ga. 42, 31 S. E. 124; *Beideman v. Railroad Co.* (N. J. Ch.) 19 Atl. 731; *City of Leavenworth v. Douglass* (Kan. Sup.) 53 Pac. 123; *Attorney General v. Railroad Co.*, 24 N. J. Eq. 49; *Hinchman v. Railroad Co.*, 17 N. J. Eq. 75, 86 Am. Dec. 252; *Watson v. Railway Co.* (W. Va.) 39 S. E. 193. See, also, *Bacon v. Walker*, 77 Ga. 336; *Railroad Co. v. Cox*, 93 Ga. 564, 20 S. E. 68; *Long v. City of Elberton*, 109 Ga. 28, 34 S. E. 333, 46 L. R. A. 428, 77 Am. St. Rep. 363. From this rule, it follows that injuries and inconveniences to persons residing near such works from noises of locomotives, rumbling of cars, vibrations produced thereby, and smoke, cinders, and soot, and the like, which result from the ordinary and necessary, and therefore proper, use and conduct of such works, are not nuisances, but are the necessary concomitants of the franchises granted. *Austin v. Railway Co.*, 108 Ga. 687-689, 34 S. E. 852, 47 L. R. A. 755; *Wood, R. R.* p. 722; *Whitney v. Railway Co.*, 69 Me. 208; *Beseman v. Railroad Co.*, 50 N. J. Law, 235, 13 Atl. 164; *Costigan v. Railroad Co.*, 54 N. J. Law, 233, 23 Atl. 810;

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*Railroad Co. v. Speer*, 56 Pa. 325, 94 Am. Dec. 84. We think these rules are based upon the soundest reason, and are clearly distinguishable from cases like that of *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, where railroads erect engine houses, coaling stations, or work shops, on their rights of way, from which the emission of ordinary noises, smoke, soot, and cinders may be a nuisance to owners and residents of abutting property, like other cases of lawful business not partaking of a public nature, and not having legislative sanction. See *Sawyer v. Davis* (Mass.) 49 Am. Rep. 27; *Romer v. Railroad Co.* (Minn.) 77 N. W. 825, 74 Am. St. Rep. 455. To make such rules uncertain is to invite a mass of litigation, and clog the wheels of commerce. The contention of the defendants in error that this terminal yard of switches and side tracks is a nuisance at Inman Park because dwellings were erected there before the construction of the yard, and it could have been located at another point, where there were no residences, without being a nuisance to any one, is without modern legal precedent to sustain it, and is unsound for at least two reasons. In the first place, the terminal yard was located at the terminus of one railroad, on an existing right of way of another railroad, and under statutory power. We have adverted in paragraph 1 of this opinion to the power of the Atlanta Belt Line Company to locate its eastern terminus on the Georgia Railroad at or near Inman Park, and to the defendants in error being remediless to change that location after the work was completed, even if they had any right to stop the work at all. We also referred to the power of that railroad company to acquire, by lease, land for its necessary facilities, at such eastern terminus. It had the power to put in all the side tracks it needed, and side tracks cannot be put in without switches. "A power to build side tracks is essential to the purpose and use of the road. A power to build a railroad of a single track, without the means of passing the trains or of leaving the track for the shifting of cars, and without standing room for the cars not in motion, would be clearly wanting in all that is necessary to safety, convenience, and utility, and would be vain and nugatory. \* \* \* A switch is but a mechanical contrivance or movable opening to pass cars from one track to another. \* \* \* The spot where the openings in the main track should be placed falls within the absolute discretion of the company, and cannot be readjudged by a private citizen who lives along the line of the road." *Railroad Co. v. Speer*, 56 Pa. 325, 94 Am. Dec. 84. In the second place, it is obvious, if the terminal yard is a nuisance because located near dwellings, that it would clearly be a nuisance wherever it might be put, even in the woods or in a field, as soon as the owners of the adjacent land build houses on their land; for the old rule, maintained by some authorities, that coming to a nuisance will prevent a person so coming from

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making any complaint, has long since been exploded. 16 Am. & Eng. Enc. Law (1st Ed.) 934; Railroad Co. v. Woodruff, 86 Ga. 94, 13 S. E. 156 (3); People v. Detroit White Lead Works (Mich.) 46 N. W. 735, 9 L. R. A. 722; 2 Wood, Nuis. § 574.

5, 6. While the rule above stated is undoubtedly correct in view of the authorities, it does not follow that railroad works authorized by statute cannot become nuisances by their improper construction, or by their negligent and improper use after a proper construction. 2 Wood, Nuis. 761; 19 Am. & Eng. Enc. Law (1st Ed.) 925; 4 Wait, Act. & Def. p. 785. The reason is that such exceptions do not fall within the legislative grant. It is, therefore, correct, in such qualified cases, to hold railroad companies to an accountability; for the legislative power given to them to construct a work, which relieves them from all liability for the ordinary and necessary incidents flowing therefrom, though causing annoyance to others, does not invest them with an unbridled license to use their own property as they please, without any consideration for, and to the great detriment of, the rights and property of others. Some of the instances under which it is generally held that a nuisance may arise from the improper conduct of a railroad work authorized by statute, and which points are involved in this case, are: (1) Using defective engines which scatter unnecessary quantities of sparks, cinders, and smoke (Austin v. Railway Co., supra); (2) the improper management of proper locomotives by using a greater amount of steam than is reasonably necessary, by which an unusually large number of sparks are emitted, in attempting to draw too heavy a load up grade (3 Elliott, R. R. § 12,225); (3) the sounding of whistles, ringing of bells, and blowing off of steam, at improper times, and in an unnecessary manner (Austin v. Railway Co., supra); (4) the running of trains or cars, or using locomotives, on Sundays, by which churches are rendered less valuable for the purposes to which they are devoted, and divine worship therein on such days is greatly and unreasonably disturbed from noises, smoke, and cinders, not to speak of the like discomfort on these days to individuals residing at such points (3 Wood, R. R. pp. 1615, 1616; 4 Wait, Act. & Def. p. 758; First Baptist Church v. Schenectady & T. R. Co., 5 Barb. 79).

From what we have heretofore said, it will be seen that the defendants had, under statutory powers, the lawful right to locate and operate at Inman Park, on the right of way of the Georgia Railroad & Banking Company, a properly constructed and properly operated terminal yard, and, if they did no more than this, the operation of the yard could not be prevented by an injunction, for they could not be enjoined from doing that which the law authorized them to do; but the statutory power to locate and operate the yard at the point in question was impliedly and necessarily qualified by the limitation that



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it could only be lawfully exercised by constructing and operating the yard in a proper manner,—that is, with due regard to the rights of others. So, while a properly constructed and properly operated yard at this point could not be a nuisance, a railroad terminal yard thus located might be a nuisance if so improperly constructed as to produce, even when carefully operated, noises, smoke, cinders, etc., in greater quantities than would be produced by such operation if it were properly constructed; and, though properly constructed, its negligent and improper operation might produce noises, smoke, cinders, etc., largely in excess of what would result from its proper operation, and thus create specific nuisances which the plaintiffs would have the right to enjoin. There was some evidence tending to show that the yard was improperly constructed in that it was built upon a grade, and not upon a level, and also evidence tending to show that the noises, smoke, etc., complained of, and which resulted from the operation of the yard, were greater than necessary to a proper conduct of the business. On both these points there was much and strong evidence to the contrary, and as to the first there was a very decided preponderance of testimony to the effect that the construction of the yard was proper. Reading the opinion of his honor below in the light of this fact, and carefully considering the same, together with the terms of the order granting the injunction, we have no hesitation in concluding that he did not grant the injunction upon the theory of improper construction of the yard. In other words, if the evidence had been precisely as it is, save that it had affirmatively appeared that the yard had been built upon a dead level, no one reading Judge Gober's opinion in the case could have the slightest doubt that his judgment would have been just as it was. This being so, can the granting of the injunction be sustained upon the view that the noises, smoke, etc., were greater than necessary, and that, as a consequence, the entire operation of the yard was a nuisance? We think not. The order provided: "That on and after the first day of October, 1901, the defendants, and each of them, their officers, agents, and servants, be and are hereby restrained and enjoined from doing any of the acts complained of on the tracks, roadbed, right of way, or premises of the Georgia Railroad & Banking Company, opposite Inman Park and the residences of petitioners, in switching and using the same for terminal purposes, and from doing the acts complained of, at said places, as set forth in their original and amended petition." In the light of what has been laid down above, this order was too broad, in that its necessary effect was to enjoin the prosecution of a lawful business, even though properly and legitimately carried on. If, in the carrying on of this business, there were features rendering it, to a greater or less extent, a nuisance, the evidence should have been sufficiently clear to enable the judge to ascertain with some degree of definiteness in what

respect there were excesses in the matter of making noises, emitting smoke, etc., so that he could, in the order of injunction, point out and prevent whatever acts over and beyond those necessary did constitute nuisances. The evidence in this case falls very far short of coming up to this requirement. If there were unlawful features connected with the operation of the yard, the evidence fails to separate them from those that were lawful, and to so point them out that the judge could, by injunction, prevent their repetition. As to the inconveniences, annoyances, and disturbances complained of as a continuing nuisance resulting from the operation of the terminal yard on Sundays, and forming the fourth excepted instance hereinbefore specified, we think the plaintiffs' case is sustained by the facts and the law. Sunday is not an ordinary working day. It is "a day observed by the Christian world as holy, and set apart for the purpose of rest and worship." 24 Am. & Eng. Enc. Law (1st Ed.) 528, 529. This is, in part, shown by the interdiction put by the statute upon the starting of freight trains in this state after 12 o'clock midnight on Saturdays, or the arrival of such trains at their destination, after 8 o'clock a. m. on Sundays, that had been started at a proper time, excepting freight trains of live stock, fruit, vegetables, and other perishable articles. Pen. Code, § 420. It has been held that a railroad company is not bound to carry passengers or freight on Sunday, even when a statute permits it to do so, and if it contracts to do so, and afterwards fails to carry out the contract, it is not an infraction of the company's general duty as a common carrier. See note in 4 Am. & Eng. Enc. Law (1st Ed.) 540, and cases there cited. The pastors and the trustees of two churches located in Inman Park testified, in common, that the loud noises on Sundays, from the blowing off of steam, ringing of the bells of engines, and the moving of the engines and trains back and forth over the tracks beside and near the churches, cause intolerable noises, jar, and inconvenience to all worshiping in the churches; that the dense volumes of smoke, soot, and cinders which are emitted from the engines, and pervade the church buildings during church services on Sundays, cause the greatest discomfort and annoyance to the pastors and the congregation; and that it is often impossible to hear what is being said by the pastors in the churches. It is to be noted, too, that these inconveniences are confined to the locality of the churches and terminal yards, and that the general public do not share in them. These facts are not denied by the railroad companies. They merely state that it is "occasionally" necessary to use the yard for switching purposes on Sundays, although the evidence shows that the yard is so used on Sundays very frequently. In no part of the evidence for the railroad companies is it stated that such work on Sundays is a necessity, except, as above mentioned, "occasionally." The evidence, then, shows that such work is carried on, on Sundays, more

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as a matter of convenience to the railroad companies than of necessity, and, therefore, is done unnecessarily. The exception usually made in favor of works of necessity on Sundays does not embrace work which is merely convenient, but not necessary. 24 Am. & Eng. Enc. Law (1st Ed.) 542. Consequently, what is done in this regard unnecessarily is a nuisance. See, also, Village of Pine City v. Munch (Minn.) 44 N. W. 197, 6 L. R. A. 763. The remedy for this objectionable feature, so far as the defendants in error are concerned, is to enjoin that, and nothing else, which is the procedure adopted by this court in the case of Hill v. Fertilizer Co., 112 Ga. 788, 38 S. E. 42, 52 L. R. A. 398, where only the unnecessary blowing of the factory whistle was restrained. We therefore conclude, after a careful consideration of this case in all its bearings, that the judgment of the court below, granting an interlocutory injunction, should be reversed, except only as to restraining the use of this terminal yard for switching purposes on Sundays, and direction is given that the judgment be so modified as to apply only to the Sabbath day.

Judgment reversed with direction. All the justices concurring, except LEWIS, J., absent on account of sickness.

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WEST CHICAGO ST. RY. CO. *et al.* v. HORNE.

(*Supreme Court of Illinois, June 19, 1902.*)

[64 N. E. Rep. 331.]

**Injury to Passenger—Action against Lessor and Lessee—Sufficiency of Verdict.\***

Verdict against "defendant," in an action for personal injuries by a passenger against a company operating a street railroad and a company owning the road and leasing it to the operating company, in which but one defense is interposed, is sufficient to support a verdict against both companies, both being liable for such injuries.

**Instructions.**

When the instructions given fully state the law applicable to the case, the refusal to give requested instructions is not error.

**Appeal from appellate court, First district.**

Action by John W. Horne against the West Chicago Street Railway Company and another for injuries to plaintiff while a passenger on defendants' lines. From a judgment of the appellate court (100 Ill. App. 259) affirming a judgment for plaintiff, defendants appeal. Affirmed.

John A. Rose and Louis Boisot (W. W. Gurley, of counsel), for appellants.

George C. Mastin and Charles R. Whitman, for appellee.

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\*As to whether lessor railroad company is liable for lessee's negligence, see foot-note appended to *Sias v. Rochester Ry. Co.* (N. Y.), 1 R. R. 167, 24 Am. & Eng. R. Cas., N. S., 167.

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HAND, J. This was an action on the case, brought by the plaintiff in the superior court of Cook county, against the defendants, the West Chicago Street Railway Company and the Chicago Union Traction Company, to recover damages for personal injuries alleged to have been received by the plaintiff while a passenger in a car operated by the Chicago Union Traction Company, as lessee of the West Chicago Street Railway Company. The declaration consisted of one count, which alleged that the defendants were in possession of and operating a certain line of street railway and a certain train of cable cars running thereon; that the plaintiff was a passenger on said train of cars, riding on a grip car, and that the defendants so carelessly, negligently and improperly drove and managed said grip car that it ran into and struck against a certain wagon, whereby the plaintiff was struck with great force and violence by the collision with said wagon, and injured. The defendants pleaded separately, each filing the general issue. The jury returned into court the following verdict: "We, the jury, find the defendant guilty and assess the plaintiff's damages at the sum of \$3,000." Upon this verdict judgment was rendered in favor of the plaintiff and against both the defendants for \$3,000, which judgment has been affirmed by the appellate court and a further appeal has been prosecuted to this court.

It is first assigned as error that the court erred in holding that the verdict was sufficient to support a judgment against both the defendants or against either of them. The criticism made upon the verdict is that it uses the word "defendant" instead of the word "defendants." We think this irregularity wholly immaterial, as the rule is that if, by looking into the record, the verdict can be seen to be responsive, it will be sustained. On looking into the record it appears that the West Chicago Street Railway Company was the lessor and the Chicago Union Traction Company the lessee of the street railway upon which the plaintiff was injured, and the law is well settled that when an injury results from the negligence or unlawful operation of a railway, whether by the corporation to which the franchise is granted or by another corporation which the proprietary company authorizes or permits to use its tracks, both the lessor and the lessee are liable to respond in damages to the party injured. *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559; *Railroad Co. v. Meech*, 163 Ill. 305, 45 N. E. 290. In view of this fact there is no uncertainty about this verdict, and the defendants were in no wise prejudiced by the informality in the verdict nor by the entry of judgment thereon. Although there was more than one defendant there was but one defense, and if one defendant was liable both were liable. There was no issue involved in the pleadings which was not determined by the finding of the verdict, and the omission of the letter "s," indicating thereby the singular instead of the plural number, in no way affected



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the validity of the verdict. The word "defendant" was used in the verdict as a collective noun, and included all the parties defendant. *Bacon v. Schepflin*, 185 Ill. 122, 56 N. E. 1123.

It is next assigned as error that the court erred in giving to the jury the second and third instructions requested by the plaintiff and in refusing to give to the jury the twenty-second instruction requested by the defendants. We have examined these instructions with care, and do not think the instructions which were given are subject to the criticism made thereon by the defendants, and the instruction which was refused was covered by the other instructions which were given; and we are of the opinion that, when all the instructions given to the jury in this case on behalf of the plaintiff and defendants are taken together and considered as one series, they fairly lay down the rules of law applicable to the case, and that the defendants were not injured by the action of the court in the regard complained of. The plaintiff was injured while riding as a passenger on the defendant's car, and we think the remark contained in the opinion of the appellate court filed in this case, that "the evidence was such that there could not well be a verdict other than for the plaintiff and against the defendants," fully justified by the record. We find no reversible error in this record, and the questions raised by the defendants in their assignment of errors and discussed by their original and reply briefs are of so refined and technical a character and so devoid of merit as to justify this court in holding that this appeal was prosecuted for delay. The judgment of the appellate court will therefore be affirmed, with 10 per cent. damages.

Judgment affirmed.

CHICAGO, ST. P., M. & O. R. CO. v. SCHULDT *et al.*

(*Supreme Court of Nebraska, Oct. 22, 1902.*)

[92 N. W. Rep. 162.]

#### Failure of Shipper to Care for Stock.

Where a shipper agrees to personally accompany and care for the watering of live stock transported by a railway company, and is given free transportation for that purpose, and is supplied with proper facilities, he cannot complain of an injury arising from lack of such care in the matter of watering, arising out of his own fault.

#### Carriers of Live Stock—Limiting Liability—Shipper Agreeing to Care for Stock.\*

The agreement that the shipper shall accompany the stock and be responsible for its care is, when proper facilities are supplied not a limitation of the carrier's liability, as contemplated by section 4, art. 11, of the state constitution.

#### Same—Same—Same.

The care of live stock while being transported is a mere incident to

\*See *Burns v. Chicago, etc., Ry. Co. (Wis.)*, 17 Am. & Eng. R. Cas., N. S., 290, and foot-note 291.

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its transportation, and transportation agencies have the right to contract against their assumption of liability that accrues to them merely as bailees, and in common with other bailees, and not strictly as common carriers.

(Syllabus by the Court.)

Commissioners' opinion. Department No. 1. Error to district court, Cuming county; Evans, Judge.

Action by Charles Schuldt and others against the Chicago, St. Paul, Minneapolis & Omaha Railroad Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Benjamin T. White, James B. Sheehan, and J. B. Barnes, for plaintiff in error.

Ira Thomas and W. W. Sinclair, for defendants in error.

DAY, C. On July 1, 1897, the plaintiffs shipped 58 head of hogs over the defendant's railway from Bancroft, Neb., to South Omaha, Neb. The hogs were loaded on the car about 9 o'clock in the evening, and, when delivered to the consignee at the place of destination upon the following morning, 22 were dead, and the rest were in a very bad condition, on account of being overheated. The plaintiffs charge that the injury was the result of the failure of the defendant to pour water over and upon the hogs at different stations along the route, and in this particular it was alleged that it was necessary to the safe and proper transportation of said hogs that they be so watered. The answer, among other things, alleged that, at the time the defendant received said car of hogs from the plaintiffs, it entered into a contract with the shippers which contained a clause as follows: "The said shipper agrees to load, unload, and reload all of said stock at his own expense and risk, and to feed, water, and attend to the same at his own risk and expense, while it is in the stock yards of said company awaiting shipment, and while on the cars or at feeding or at transfer points, or where the same may be unloaded for any purpose;" that for the purpose of carrying out the contract, and enabling the plaintiffs to do so, the defendant furnished the plaintiffs free transportation for one person to ride on its train from Bancroft to South Omaha, to care for, look after, and water said stock according to the terms of the contract; that plaintiffs accepted said free transportation, and put a person as their agent on said train, who took charge of said car load of hogs, and that said agent went through to the point of destination to perform plaintiffs' part of said contract; that said agent so in charge of said stock never at any time informed the defendant's servants, agents, or employees in charge of said train that said hogs needed or required water, or any other care whatsoever; that said agent never at any time requested defendant to water said hogs, or permit the said agent to do so; that defendant had no knowledge of the condition of said hogs, but relied upon the agent of plaintiffs to look after them and request the defendant to water them

when necessary; that defendant's agents, servants, and employees were at all times ready and willing to water said hogs whenever notified or requested to do so; that, if said hogs were killed or injured for want of water or care, it was through no fault or negligence on the part of the defendant, but that the same occurred wholly and solely on account of the negligence of plaintiffs' agent in not looking after, caring for, and ascertaining the condition of said hogs, and informing the defendant of the necessity of watering them. A demurrer to the portions of the answer above referred to was sustained. The trial resulted in a verdict and judgment for the plaintiffs, to review which the defendant had brought error to this court.

The real question presented by the record is whether a shipper of live stock, who agrees to look after and care for stock during its transportation, and who, for the purpose of carrying out the contract, receives free transportation, can recover for injuries to the stock, arising from his own neglect to properly care therefor. On behalf of the plaintiffs it is contended that the provision of section 4, art. 11, of our constitution, which provides that "the liability of railroad corporations as common carriers shall never be limited," applies to cases of this kind, and that the railroad company is liable as an insurer. It may be granted that ordinarily, and when no special agreement is made, it is the carrier's duty to attend to the watering of live stock in such a way as to prevent loss from the lack of it. So much is conceded by the railway company in this case. It is not thought, however, that this liability is the consequence of the contract being one for carriage. It is just as much the incident of any other bailment of a live animal. It would be as much the duty of one who should undertake to yard or pasture these hogs as it would be of a transportation company. It is a mere incident of the possession and control of another's live property. As an incident, only, of the contract of carriage, and not a necessary part of it, there seems no reason why this duty may not be retained by the owner, where he is taken along in charge, and given all necessary facilities to perform it. Such was the allegation in this case. The agreement seems not to have been a limitation on the liability of the company as a carrier, but a provision that the incidental duty as a bailee of caring for this stock should not devolve upon the company, in consideration of its taking the owner along free of charge, and furnishing him with facilities for attending to it. There seems no good reason for holding that a carrier may not make an agreement of this character, as well as a stable or pasture keeper who should take stock on condition that its owner would see to the watering and care thereof, so long as the conditions of the transportation do not prevent its being done. It does not seem possible that our constitution was intended to prevent freedom of contract as to matters merely incidental to the contract of transportation, and not peculiar or nec-

essary to it. Nor does such seem to be the holding in other states having statutory provisions similar to our constitution. *Grieve v. Railway Co.*, 104 Iowa, 659, 74 N. W. 192; *Oxley v. Railway Co.*, 65 Mo. 629; *Railroad Co. v. Stribling* (Tex. Civ. App.) 34 S. W. 1002. In *Grieve v. Railway Co.*, supra, the court was dealing with a statute as follows: "No contract, receipt, rule or regulation shall exempt any railroad corporation \* \* \* from the liability of a common carrier, \* \* \* which would exist had no contract \* \* \* been made or entered into." The facts in that case were very similar to the case at bar. It was held that it was competent for the company to employ the shipper to take care of his own stock, and that he could not recover for loss occasioned by his own negligence.

The citation of Nebraska cases entirely fails to show that this contract by the owner to look after the feeding and watering of his stock in transit is one of the limitations on the carrier's liability which the constitution forbids. In *Railway Co. v. Vandeventer*, 26 Neb. 222, 41 N. W. 998, 3 L. R. A. 129, the contract held bad was one requiring claims for damages to be made before the removal of the stock, and limiting the amount of recovery to a specific sum. In *Railroad Co. v. Palmer*, 38 Neb. 463, 56 N. W. 957, 22 L. R. A. 335, the contract was an agreement limiting the liability to injury on defendant's own lines. In *Railroad Co. v. Marston*, 30 Neb. 241, 46 N. W. 485, the validity of the agreement was expressly stated to be not considered. In *Railroad Co. v. Gardiner*, 51 Neb. 70, 70 N. W. 508, the contract limiting the amount of liability to a specific sum on a horse shipped from Illinois was held bad, although good in that state. And *Railroad Co. v. Witty*, 32 Neb. 275, 49 N. W. 183, 29 Am. St. Rep. 436, it is cited as holding the same conclusion. We are cited to no Nebraska case expressly passing upon the kind of agreement presented by the case at bar, but in *Railroad Co. v. Williams*, 85 N. W. 832, 55 L. R. A. 289, this court declares, "The rule is not doubted that, where the owner is in charge of his stock in transit, the burden is on him to show a loss caused by the carrier's negligence." Evidently, if to recover the owner must show the carrier's negligence, the latter is not chargeable simply as an insurer. It is equally evident that, if the carrier's negligence must be shown, a loss caused by the shipper's own default cannot be recovered for.

It is not thought necessary to discuss further the questions relating to instructions and the admission of evidence. The errors complained of in these respects seem to grow out of the conception of the trial court that the contract in question is entirely void.

We think it entirely competent for a carrier, where the owner or his employee is carried for that purpose, and where ample facilities are furnished the shipper to do so, to agree with him to look after, feed, and water his stock in transit.



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It follows, therefore, that the court erred in sustaining the demurrer to the answer, and rejecting the evidence of the contract. We therefore recommend that the judgment be reversed, and the cause remanded to the district court for a new trial.

HASTINGS and KIRKPATRICK, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded.

ATCHISON, T. & S. F. RY. CO. v. MORRIS.

(*Supreme Court of Kansas, Oct. 11, 1902.*)

[70 Pac. Rep. 651.]

**Jurisdiction.**

By the act of February 27, 1895, the general provisions of the statute then in existence, conferring jurisdiction upon the supreme court, were not repealed, but suspended during the existence of the courts of appeals, and immediately upon the expiration of such courts of appeals such provisions became operative, and as if no such act had been passed.

**Common Carriers—Limiting Liability.\***

While a common carrier cannot stipulate against its own negligence, it may, for a valuable consideration, contract that, if damage results to the shipper by reason of its negligence, or the negligence of its agents, servants, or employees, such shipper shall give notice of the damage within a reasonable time.

(Syllabus by the Court.)

In banc. Error from district court, Kingman county; P. B. Gillett, Judge.

Action by T. E. Morris against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

For former opinion, see 67 Pac. 837.

A. A. Hurd and O. J. Wood, for plaintiff in error.

C. W. Fairchild, for defendant in error.

GREENE, J. In writing the opinion of the court in this case we are paying a tribute to the learning of our lately deceased associate, Justice Ellis. Last April this cause was dismissed by this court in an opinion written by him, holding that it had no jurisdiction over this litigation. In that opinion he did not concur. His insistence that the court had made a mistake greatly influenced it in granting a rehearing, and finally in overruling its former opinion, and in now adopting the views then entertained by him.

This was an action to recover damages claimed to have been sustained by the plaintiff, resulting from the negligence of the railway company, its agents and servants, in the shipment of

\*See foot-note appended to *Southern Ry. Co. v. Adams (Ga.)*, 4 R. R. R. 912, 27 Am. & Eng. R. Cas., N. S., 912.

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two cars of cattle from Kansas City to Spivey, Kan. The cause was tried at the November, 1900, term of the district court of Kingman county. A motion for a new trial was overruled, and on January 26, 1901, final judgment for \$250 was rendered for plaintiff. The defendant below prosecutes this proceeding in error.

The defendant in error challenges the jurisdiction of this court on the grounds that his judgment became final on January 26th, and that this court did not have jurisdiction at that time to entertain proceedings in error to review a judgment of the district court where the amount in controversy was less than \$2,000. In the former opinion it was held that: "The law of 1895 creating appellate courts by granting to such courts exclusive appellate jurisdiction in ordinary civil actions 'where the amount or value' did not exceed two thousand dollars, and by repealing all acts and parts of acts inconsistent therewith, devested the supreme court of jurisdiction in such cases, and after the expiration of the courts of appeals on the second Monday of January, 1901, the former jurisdiction of the supreme court did not revive, and was not restored until the adoption of chapter 278, Laws 1901, which took effect on March 5, 1901." With this view then entertained by the court, the cause was dismissed. Afterwards, upon application of the plaintiff in error, a rehearing was granted, and a reargument ordered upon the following propositions: "(1) Is the act of March 5, chapter 278, Laws 1901, in expressed terms retroactive? (2) If so, does your case fall within the following terms of that act? That is, does such act create a distinction between judgments rendered prior to January 14, 1901, and those subsequently rendered? (3) If so, did the legislature have the power to pass a retrospective act granting the right to prosecute an appeal or proceeding in error from a final judgment, there being no prior law granting the right to prosecute an appeal or proceeding in error from such final judgment to this court?" After this argument the justices were unable to agree that, if it were conceded the act of 1901 is in expressed terms retroactive, and the present case within the saving clause of the act, the legislature had the power to pass a retrospective statute granting the right to prosecute an appeal or a proceeding in error from a final judgment. The importance of the question, involving as it did a great number of cases, and the insistence of Justice Ellis that the court in its former opinion had misconstrued the act of 1895, led the court to a re-examination of that act, after which it is now of the opinion that its original opinion was not a correct interpretation thereof. Pertinent to a better understanding of that act, as applied to the question under consideration, are the following constitutional and statutory provisions: Section 3, art. 3, Const., provides: "The supreme court shall have original jurisdiction in proceedings in quo warranto, mandamus, and habeas corpus; and such appellate jurisdiction as

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may be provided by law." Section 1, c. 27, Gen. St. 1868, is as follows: "The supreme court shall be a court of record, and in addition to the original jurisdiction conferred by the constitution, shall have jurisdiction in all cases of appeal and proceedings in error from the district court and other courts, in such manner as may be provided by law." Section 542, c. 80, Gen. St. 1868, reads: "The supreme court may reverse, vacate or modify a judgment of the district court for errors appearing in the record." The only modification of this general appellate jurisdiction found in the statutes prior to the passage of chapter 96 of the Laws of 1895, is chapter 245, Laws 1889, which provides: "No appeal or proceeding in error shall be had or taken to the supreme court in any civil action unless the amount or value in controversy, exclusive of costs, shall exceed one hundred dollars (\$100), except in cases involving the tax or revenue laws, or the title to real estate, or an action for damages in which slander, libel, malicious prosecution or false imprisonment is declared upon, or the constitution of this state, or the constitution, laws or treaties of the United States, and when the judge of the district or superior court trying the case involving less than one hundred dollars (\$100) shall certify to the supreme court that the case is one belonging to the excepted classes." It will thus be seen that up to the time of the passage of chapter 96, Laws 1895, creating the courts of appeals, the supreme court had general appellate jurisdiction in all civil actions, except those enumerated in chapter 245, Laws 1889. If this court has no jurisdiction to hear and determine the proceedings in error in the present case, it is by reason of the provisions of chapter 96, Laws 1895, above referred to. Section 1 of this act reads: "Except as herein otherwise declared the jurisdiction of the supreme court, and the procedure therein, shall be as is now provided by law." It becomes important, therefore, to ascertain the exceptions contained in this act.

"Sec. 9. Said courts of appeals, within their respective divisions, shall have original jurisdiction, concurrent with and to the same extent as is now given by law to the supreme court in quo warranto, mandamus and habeas corpus. They shall also have exclusive appellate jurisdiction as now allowed by law in all cases of appeal from convictions for misdemeanor in the district and the courts of record; also in all proceedings in error, as now allowed by law taken from orders and decisions of the district and other courts of record, or the judge thereof, except probate courts, in civil actions before final judgment, and from all final orders and judgments of such courts, within their respective divisions, where the amount or value does not exceed two thousand dollars, exclusive of interest and costs. \* \* \* All other cases of appeal and proceedings in error shall be taken as now provided by law."

"Sec. 17. The terms of the judges so elected shall com-

mence on the second Monday in January, 1897, and continue for the term of four years and until the second Monday in January, 1901, on which date said court shall expire."

"Sec. 21. When the courts of appeals shall cease to exist by limitation of law, all cases then pending and undetermined therein shall be certified and delivered by the clerks of said courts to the clerk of the supreme court. \* \* \*

"Sec. 22. All acts and parts of acts inconsistent with this act are hereby repealed."

Transposing this section, it would read, "The jurisdiction and procedure in the supreme court shall remain as now provided by law, except as herein otherwise declared." The exceptions are declared in section 9, and are: (1) That, instead of the supreme court having exclusive original jurisdiction in cases of quo warranto, mandamus, and habeas corpus, it shall have concurrent original jurisdiction with the courts of appeals; (2) and, instead of having exclusive appellate jurisdiction in appeals from convictions for misdemeanors from the district and other courts of record, it is divested entirely of any appellate jurisdiction in such proceedings; (3) it was divested generally of jurisdiction in all proceedings in error from the district and other courts, except the probate court, in civil actions before final judgment, and from all final orders and judgments of such courts within their respective divisions, where the amount or value in controversy did not exceed \$2,000, exclusive of interest and costs. The present litigation, by reason of the amount involved, falls within the classes enumerated in the third subdivision of section 9, as above expressed. The jurisdiction of which the supreme court was divested by the act was conferred upon the courts of appeals, and by the terms of section 17 it was provided that such courts should expire on the second Monday in January, 1901. Was it the intention of the legislature to permanently divest the supreme court of appellate jurisdiction in all that class of cases enumerated in the act, or did it only intend that such jurisdiction should be suspended during the existence of the courts upon which it was conferred? There are no provisions in the act conferring jurisdiction of these cases upon any other court after the expiration of the courts of appeals. We are therefore of the opinion that the legislature only intended to suspend the operation of the general provisions of the statute during the life of the courts of appeals, and that upon the expiration of such courts, in the absence of any statute further staying the operation of such provisions, they became at once operative and effective, and the jurisdiction of the supreme court over all classes of litigation enumerated in the act of 1895 immediately thereafter attached and became reinstated as if no such act had been passed.

It is argued that section 22 repeals all provisions of the statute conferring jurisdiction on the supreme court, and, as



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that court can only exercise such jurisdiction as is expressly conferred upon it by statute, therefore a new act is necessary to restore this lost jurisdiction. There is little force in this argument. The language in section 22 is, "All acts and parts of acts inconsistent with this act are hereby repealed." This is not a general repeal of all former statutes, but only such as might in any way interfere with the operation of the act of which it is a part.

The former judgment written herein is overruled, and the motion to dismiss is also overruled.

The cattle in question were shipped under a contract, which contained, among others, the following conditions: "In order that any loss or damage to be claimed by the shipper may be fairly and fully investigated and the fact and nature of such claim or loss preserved beyond dispute and by the best evidence, it is agreed that, as a condition precedent to his right to recover any damages for any loss or injury to his said stock during the transportation thereof, or at any place or places where the same may be loaded or unloaded for any purpose on the company's road, or previous to loading thereof for shipment, the shipper or his agent in charge of the stock will give notice in writing of his claim therefor to some officer of said company, or to the nearest station agent, or, if delivered to consignee at a point beyond the company's road, to the nearest station agent of the last carrier making such delivery, before such stock shall have been removed from the place of destination above mentioned, or from the place of delivery of the same to the consignee, and before such stock shall have been slaughtered or intermingled with other stock, and will not move such stock from said station or stock yards until the expiration of three hours after the giving of such notice; and a failure to comply in every respect with the terms of this clause shall be a complete bar to any recovery of any and all such damage." The plaintiff removed the cattle from the station at Spivey to his pasture in the country without giving notice of any injury. To avoid this obligation on his part, he alleged in his reply that the injuries for which he sued to recover were not discovered by him before removing the cattle from the yards, nor in time to have complied with the provisions of the shipping contract. Upon the issues thus joined, testimony was offered both to sustain and controvert the contention of plaintiff. Testimony was also offered tending to show that the injuries sustained by the cattle were such as would naturally occur in shipping, and were known to plaintiff when they were removed from the yards. The shipping contract in question, like any other contract, should be construed in the light of surrounding circumstances, and with a view to carrying into effect the actual intention of the parties. It cannot be said that the company expected the shipper would be compelled to notify it within three hours after the arrival of the cattle of any injuries which they had

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sustained which were not observable; nor can it be assumed that the shipper contemplated, when signing the contract, that he was bound to such unreasonable requirements. The plaintiff was bound by the conditions in the contract, and he could not recover for any injuries sustained by the cattle which were obvious when the cattle were turned over to him, or which a reasonably careful man similarly situated would have observed, until he fully complied with the conditions of the contract by giving the stipulated notice. Whether the cattle sustained any injury by reason of the negligence of the company, its agents or employees, or whether such injuries, if sustained, were discoverable by the defendant before removing them from the yards at Spivey, were questions of fact, which the jury, upon conflicting evidence, found against the plaintiff in error. Such findings will not be examined, nor the evidence weighed, by this court, when it appears that every material and essential fact necessary to sustain the findings is supported by some evidence, although it may be weak and conflicting.

The court, among its other instructions, gave the following: "No. 7. By special contract the liability of a common carrier may be limited, but, while this is true, it cannot stipulate against its own negligence, and, if it is guilty of negligence, it is liable therefor notwithstanding the terms of the written contract that may have been entered into. A special contract was entered into in this case concerning the 57 head of cattle claimed to have been shipped by Mr. Morris, and both the plaintiff and defendant are bound by that contract; and the plaintiff, under the terms of said contract, cannot recover in this action. But if you find from the evidence in the case that the defendant in the shipment of said cattle was guilty of negligence, then it cannot protect itself from liability by the terms of the contract, and is liable in this action for such an amount as you find from the evidence the plaintiff has been damaged by the negligence of the railroad company in the transportation of said cattle." Complaint is made that this instruction, in effect, was that, if the cattle were injured through the negligence of the railway company, its agents, or employees, the plaintiff ought to recover for such injuries regardless of his compliance with the conditions of the shipping contract. If this instruction stood alone, or if it was not made plain by other instructions that the court did not have in mind, and did not intend to express to the jury, this idea, such instruction would be erroneous; but upon an examination of the other instructions it is easily discoverable that the court was not stating a rule applicable to the cause on trial, but was trying to formulate and state the general principle that a common carrier cannot stipulate against its own negligence.

In connection with the above instruction, the court gave the following: "No. 10. The contract of shipment in this

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case contains the following clause: 'In order that any loss or damage to be claimed by the shipper may be fully and fairly investigated, and the fact and nature of said loss be preserved beyond dispute and by the best evidence, it is agreed as a condition precedent to his right to recover any damage for a loss or injury to his said stock during the transportation thereof, the shipper, or his agent in charge of said stock, will give notice in writing of his claim therefor to some officer of the company, or to the nearest station agent, before said stock shall have been removed from the place of destination above mentioned, or from the place of delivery of the same to the consignee.' In this connection I say to you that if you find from the evidence in this case that the cattle in question, at the time that they were unloaded, were then injured, or had been injured on the trip from Kansas City to Spivey by the negligence of the railroad company in transporting them, and that the plaintiff, Morris, had knowledge of such injuries, and, having said knowledge, he unloaded said cattle, and removed the same from the place of destination without giving the notice in writing provided for in the section of the contract above quoted, the removal of the said cattle in violation of the provisions of the said section of the said contract would be a complete bar to his right to recover in this action for any damages which he may have sustained by reason of the negligence of the company in the shipping of the said cattle; but this would not apply to damages which he may have sustained which he did not know of, and were not readily to be seen." While the contention of plaintiff in error in regard to this proposition is not without force, it appears to us, however, that, as the jury in the last above instruction was plainly and distinctly informed that the plaintiff could not recover for any injuries which were easily discoverable, or which were known to him before removing the cattle, and within time to have given the notice as stipulated in the shipping contract, and as it appears from the pleadings that the plaintiff was not seeking to recover for injuries that were discoverable, or which he had discovered prior to removing the cattle, or within time to give such notice, it cannot be said the instruction was prejudicial.

The judgment of the court below is affirmed.

BURCH, J., not sitting. All the other justices concurring.

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DUELL v. CHICAGO & N. W. RY. CO.

(*Supreme Court of Wisconsin, Nov. 11, 1902.*)

[92 N. W. Rep. 269.]

**Injury to Passenger—Safe Place to Alight—Pleading.**

Where a complaint charged that the place provided by a carrier for plaintiff to alight was not a safe and proper place, in that the platform was too high and too far from the car step, and not sufficiently lighted,

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and in that defendant's brakeman had no lantern and gave no warning, etc., and the brakeman did not offer to assist plaintiff, the allegation of want of light was but one of the elements in which the platform was alleged to be defective; and hence defendant was not entitled to judgment on a special verdict finding that the platform was reasonably safe, and that the brakeman did have a lantern.

**Same—Negligence—Conjunctive Statement—Evidence.**

The fact that the acts of negligence causing injury to a passenger are alleged conjunctively does not require plaintiff to prove that all the elements of negligence concurred to produce the injury.

**Same—Duty to Light Platform.\***

A carrier's duty to use ordinary care to provide and maintain safe alighting places for passengers is not fully discharged by providing a reasonably safe platform, and if a traveler is injured in alighting on a reasonably safe platform, by reason of want of proper light, the carrier is liable therefor.

**Same—Failure to Light Platform—Sufficiency of Evidence.**

Where a passenger's testimony that the platform provided for passengers to alight was not well lighted, and that the brakeman did not offer to assist her in alighting, and had no lantern, was contradicted, and the jury found that the platform was reasonably safe, and that the brakeman had a lantern and offered to assist plaintiff, and the evidence established that there were several lights on or near the platform, a finding that the platform was not sufficiently lighted to enable plaintiff to alight in safety, which was the proximate cause of her injury, was contrary to the evidence.

Appeal from circuit court, Lincoln county; W. C. Silverthorn, Judge.

Action by Katherine S. Duell against the Chicago & Northwestern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

The purpose of this action is to recover damages claimed to have been sustained by plaintiff while alighting from one of defendant's passenger trains at Eland Junction, Wis., about 3 o'clock in the morning of June 10, 1900. The negligence alleged was that the place where the car stopped and where plaintiff was to alight was not a safe or proper place, in that the platform was too high and too far from the car step; in that there was no light at or near the platform; in that defendant's brakeman had no lantern and gave no warning, and the place was so shrouded in darkness that plaintiff was unable to distinguish the location of the platform and the distance from the step. All negligence was denied by the answer. The plaintiff testified to the absence of light, and that because she could not see the platform, in attempting to alight, her toe only struck the platform, and she slipped and was injured. The defendant's testimony showed that the distance from the edge of the platform to the lower step, on an angle, was 9 inches. The step was  $4\frac{1}{2}$  inches higher than the platform, and the distance between the edge of the platform and the step, on a line extending horizontally from the platform, was  $7\frac{3}{4}$  inches. Defendant's testimony also showed that the defendant's brake-

\*See monograph appended to *Muhlhouse v. Monongahela St. Ry. Co.* (Pa.), 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.



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man was at the place with a lighted lantern and attempted to assist plaintiff in alighting, that the cars were lighted, and the depot lighted; and that there was a lamp on a post less than 30 feet distant, and one on the side of the depot near the baggage-room door, besides other lights farther away. A motion by defendant to direct a verdict in its favor was denied. The following special verdict was rendered: "Question No. 1. Was the plaintiff injured on the 10th day of June, 1900, at the station of Eland Junction, while alighting from the train of the defendant? Answer to question No. 1 (by the Court). Yes. Question No. 2. Was the platform in question so constructed as to be reasonably safe for passengers to alight upon and from trains at the point where the accident occurred to the plaintiff? Answer to question No. 2 (by the Court). Yes. Question No. 3. When the plaintiff descended the steps of the coach towards the depot platform, was the brakeman of the defendant company standing upon the depot platform at the steps of the coach which plaintiff was descending, ready and willing to assist the plaintiff? Answer to Question No. 3 (by the Court). Yes. Question No. 4. Did the brakeman then and there have a lighted lantern? Answer to question No. 4. Yes. Question No. 5. Did the brakeman then and there offer to assist the plaintiff? Answer to Question No. 5. Yes. Question No. 6. Did the plaintiff decline the assistance of the brakeman? Answer to Question No. 6. No. Question No. 7. Was the station platform, at the point where the accident happened to the plaintiff, sufficiently lighted to enable the plaintiff, in the exercise of ordinary care, to descend from the car steps to the station platform with reasonable safety? Answer to Question No. 7. No. Question No. 8. If you answer question No. 7 'No,' then was such insufficiency of light the proximate cause of the injury plaintiff sustained? Answer to Question No. 8. Yes. Question No. 9. If you answer question No. 8 'Yes,' then ought the defendant reasonably to have foreseen that a person might be injured in getting off the cars in the nighttime onto the station platform at the point in question, under all the circumstances and conditions in which plaintiff alighted? Answer to Question No. 9. Yes. Question No. 10. Was the plaintiff guilty of any want of ordinary care which proximately contributed to the injury she sustained? Answer to Question No. 10. No. Question No. 11. If the court shall be of the opinion that the plaintiff should recover upon this special verdict, at what sum do you assess plaintiff's damages? Answer to Question No. 11. \$1,500." The defendant made a motion to strike out the answers to questions 6, 7, 8, 9, and 10, and for judgment, and, in case that was denied, for a new trial, which was denied, and duly excepted to. Exceptions were also duly filed to the charge. Judgment was entered for plaintiff, from which the defendant takes this appeal.

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Edward M. Hyzer, for appellant.

Flett & Porter, for respondent.

BARDEEN, J. (after stating the facts). It is conceded by respondent that the judgment must be reversed because of error in the judge's charge. The appellant, however, insists that the judgment should be reversed and judgment should be directed by this court in accordance with its motion in the court below. In support of this contention it is argued that the real negligence charged was a defective or improper platform, and failure of the brakeman to caution plaintiff at the time she was alighting; that the allegations of want of light was but one of the elements of negligence, put in by way of inducement, to make effective and operative the alleged defective platform, and the failure of the brakeman to assist plaintiff. We cannot agree with this contention. To so construe the complaint would be to exclude several material allegations, and do injustice to the plain intent of the pleader. The place where plaintiff was required to alight was alleged to be an improper place, for a number of reasons; that is, defendant was guilty of negligence in several respects mentioned. Among others was the failure to keep the place properly lighted. While alleged conjunctively, we do not think plaintiff was compelled to prove that all of the elements of negligence so alleged concurred in producing the injury she sustained. It was undoubtedly defendant's duty at least to use ordinary care and prudence to provide and maintain safe alighting places for passengers. *McDermott v. Railroad Co.*, 82 Wis. 246, 52 N. W. 85. Its duty may not be fully discharged by providing a reasonably safe platform. If the traveler is subjected to danger in alighting upon a reasonably safe platform by reason of the want of a proper light, the carrier may be liable in damages if an accident occurs. As said in *Patten v. Railroad Co.*, 32 Wis. 524: "There is no absolute rule as to what constitutes negligence in a case like this. Whether there was a want of such care and prudence as the company should exercise in a particular case, in not having a light in or about the depot when the plaintiff left the train, is not a question of law, but, rather, of law and fact." We think there was enough in the complaint to warrant the court in submitting to the jury the question of defendant's negligence, arising from want of lights at the place in question.

A more important question arises on defendant's motion to direct a verdict, and motion to correct the verdict and for judgment. By reference to the special verdict, it will be seen that the trial court determined that the platform in question was reasonably safe, and that defendant's brakeman was ready and willing to assist plaintiff as she alighted. The jury found that the brakeman had a lighted lantern, and offered to assist plaintiff. They further found that the platform was not sufficiently lighted to enable plaintiff to alight in safety, which was

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the proximate cause of plaintiff's injury. The only evidence to support this conclusion was given by plaintiff, and was of such a character, in view of the testimony of other witnesses, as to lead the trial court to remark that "it is a pretty thin case to submit to the jury." The better to understand the bearing of the testimony of other witnesses, we quote plaintiff's statement of the situation: "I did not step on the platform, because I could not see it; it was so dark. We had no light, the brakeman had no light, and there was no light near the train; near the depot; near the platform. There was no light whatever on the platform there. There were no lights visible anywhere that I saw. No light shone where I was when I got off. There was a light in the depot, after we got in the depot. That was the only light I saw." The jury have impeached the plaintiff in one respect, by finding that the brakeman was there, ready and willing to assist, and that he had a lighted lantern. That fact is overwhelmingly established by the evidence. She is further impeached by the fact that there were several other lights on the platform,—one within less than 30 feet from where she was. There is also evidence of another light on the side of the depot near the baggage-room door. The depot was lighted; there having been lights in the men's waiting room, office, woman's waiting room, and lunch room,—all of said rooms having one or more windows toward the train. The cars were also lighted. Several witnesses testified as to the amount of light; one saying that "it was not very dark"; another, "The condition was so you could see the space between the steps and the platform." Another witness, who was waiting for the arrival of the train, walked up and down the platform, and said that it was light enough to see to walk. As is usual in such cases, where there is no absolute standard of comparison, the witnesses vary somewhat as to the exact condition. There is, however, no dispute about certain facts which impeach the plaintiff's testimony, and render it absolutely certain she was mistaken. She says there was no light there of any kind. It is absolutely certain, and the jury so found, that the brakeman stood at the steps with a lighted lantern, and attempted to assist plaintiff. No witness testified absolutely as to the amount of light given out by the lantern. It is, however, a matter of common knowledge that such lanterns throw light some little distance. Summing up the situation, we have the facts established to substantial certainty that the train was lighted; the depot lighted; several lamps on the platform were lighted, one of which was within 30 feet of the place of the accident; the brakeman was at the place with a lighted lantern; and the testimony of other witnesses that they could see to walk on the platform, and see the space between the step and the platform. Opposed to this is the bare statement of plaintiff quoted. Her statement being impeached by the jury's finding

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and other established facts in the case, we think the court should have granted the defendant's motion to strike out the answers to questions as requested, and granted the judgment for defendant.

The judgment will therefore be reversed, and the cause remanded, with directions to grant such motion and to enter judgment for defendant. So ordered.

## INDIANA RY. CO. v. FEIRICK.

(*Supreme Court of Indiana, May 27, 1902.*)

[64 N. E. Rep. 221.]

**Railways—Personal Injuries—Person on Track—Passenger—Pleading—Complaint—Construction.\***

A complaint alleged that plaintiff, a passenger, told the conductor where he desired to go, and that, relying on the statement of the conductor, he left the train at the wrong point, and did not aver wrong or negligence in such act, or dereliction of duty to a passenger, but alleged that, not knowing any other way to reach his destination, he started along defendant's road, and, while proceeding "with all due care and prudence, he struck his foot against a stake that defendant's agents or employees had carelessly and negligently left sticking above the ground," and was injured, and that his injury was "wholly from the aforesaid carelessness": *held*, that the complaint was for an injury, in tort, and not on the contract of carriage, and, as it did not contend that plaintiff was wrongfully put off at such point, he was a trespasser in going on the road, and the complaint did not state a cause of action.

Appeal from circuit court, St. Joseph county; Lucius Hubbard, Judge.

Action by John Feirick against the Indiana Railway Company. From a judgment for plaintiff, defendant appeals. Transferred from the appellate court under the provisions of the act of March 13, 1901 (section 1337u, Burns' Rev. St. 1901). Reversed.

A. L. Brick and D. D. Bates, for appellant.  
Hastings & Woodward, for appellee.

HADLEY, J. Suit by appellee to recover damages for personal injuries alleged to have been caused by appellant. It is averred in the complaint that the defendant is a railroad corporation, and owns and operates a trolley railroad between South Bend, in St. Joseph county, and Goshen, in Elkhart county, upon which, as a common carrier, it transports passengers for hire to and from the cities and towns, and to and from a highway known as the "County-Line Road Crossing," and other highway crossings along its line, where passengers desired to get on or off its cars. The complaint then proceeds: "That at about 6:30 o'clock in the afternoon of Feb-

\*As to the care required in taking on and setting down passengers, see foot-note appended to *Pittsburg, C., C. & St. L. Ry. Co. v. Gray* (Ind. App.), 4 R. R. R. 120, 27 Am. & Eng. R. Cas., N. S., 120.



## Indiana Ry. Co. v. Feirick

ruary 24, 1900, plaintiff entered one of the defendant's cars at the said city of Goshen as a passenger from Goshen to the aforesaid and described county-line road crossing, and told the conductor in charge of said car that his destination was the aforesaid county-line road crossing, and paid to the said conductor the amount demanded by him for transportation to the place where plaintiff desired to go. The plaintiff was a stranger along the route of defendant's line, and depended upon the knowledge of defendant's agent or conductor in charge of said car as to the location of said road crossing, and told the conductor of his desire to get off at the aforesaid crossing; and the conductor agreed to tell plaintiff when the car arrived at the place where plaintiff desired to stop. Plaintiff depended upon the defendant's conductor to notify him of the arrival of the car at the aforesaid place. Some time after the car had passed through the city of Elkhart on its way to plaintiff's destination, the said conductor came to plaintiff and informed him that the car had arrived at the place where plaintiff desired to stop; and plaintiff relied on the conductor's statement, and acted in accordance with his invitation, and went to the rear end of the car and stepped off onto the ground. The car passed on to its destination, the city of South Bend. After plaintiff had alighted and the car had passed on, plaintiff discovered that he had been put off at the wrong road crossing, and at a point where he was an entire stranger and entirely unacquainted. It was a very cold night, and dark and stormy, and plaintiff did not know where he was, except that he was east of the point where he wanted to stop, and did not know of any other route to the said point. He proceeded west along the line of said street car company, with all due care and caution, toward the said county-line road crossing, and, while passing along the said line with all due care and prudence, he struck his foot against a stake that defendant's agents or employees had carelessly and negligently left sticking above the ground four or five inches, and was thrown to the ground, greatly lacerating, bruising, breaking, and permanently injuring plaintiff's knee. Plaintiff further avers that he did not know of any other route to pursue after he had been put off the car, nor could he have known of any other, under the circumstances, and that he did not know said stake was placed where it was, but that all of said injuries, disabilities, pains, and sufferings were caused wholly from the aforesaid carelessness, wantonness, and negligence of defendant. Plaintiff further avers that by reason of said negligence he has been badly and permanently injured," etc. Appellant's demurrer to the complaint was overruled. Answer, the general issue. Trial by jury. Verdict and judgment for appellee. The view we have taken of the complaint makes it unnecessary to further state the contents of the record.

The theory of the pleader is obscure. From the nature of the action, it cannot be treated as a suit for damages for a

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breach of contract of carriage. *Railroad Co. v. Eaton*, 94 Ind. 474, 478, 48 Am. St. Rep. 179. It must be regarded as an action sounding in tort, and the debated question is whether the tortious act complained of is appellant's dereliction of duty as a common carrier, in causing appellee to leave its car at the wrong place, or appellant's negligent obstruction of its railroad, whereby appellee was injured while walking over it. In deciding the question, we must construe the complaint by the sense usually imported to its terms, not by what appellee now asserts to be his meaning. Thus construing it, it will be observed that appellee makes no complaint about being discharged at the wrong place, or of the manner of his discharge. He does not aver that the act of the conductor which induced him to leave the car was either negligent or wrongful, nor does he use any other epithet to characterize his discharge as being otherwise than rightful. Neither does he state or ask for any damages by reason thereof. But all the averments concerning his taking passage on the car, his place of destination, his want of knowledge of the route, the circumstances of his leaving the car, are mere recitals of the same class, as matter of inducement, to show that he was rightfully on the railroad, when, while proceeding "with all due care and prudence, he struck his foot against a stake that defendant's agents or employees had carelessly and negligently left sticking above the ground four or five inches, and was thrown to the ground, greatly lacerating, bruising, and permanently injuring the plaintiff's knee." And he specifically avers "that all of said injuries, disabilities, pains, and suffering were caused wholly from the aforesaid carelessness, wantonness, and negligence of the defendant." He further says "that by reason of said negligence he has been badly and permanently injured," etc., and by reason thereof has been damaged in the sum of \$2,000. Our attention is called to the rule that required the character of a pleading to be determined from the facts stated, and not from the epithets employed. But this rule will not permit us to carry qualifying terms from one subject to another to meet the varying fortunes of a lawsuit. Appellee had the right to predicate his action upon the delinquency of appellant in causing him to leave the car at the wrong place, or upon the wrong of the company in leaving its roadway obstructed in a manner dangerous to footmen, or upon both grounds. But under the most liberal rules of construction, we cannot assume that he intended to base his case upon both, when he fails to complain of one, and expressly avers that the other was wrongful, and the sole cause of the injuries for which he seeks to recover. The case cannot, therefore, be brought within the rule contended for,—that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately and directly brought about by other

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intervening agencies. Under the complaint as it stands, we must assume that the discharge of appellee from the car was satisfactory to him or justifiable. If satisfactory or justifiable, then the company's duty to him as a common carrier was performed when he left the car safely. And as he stood upon the crossing, after the departure of the car, in the absence of any showing to the contrary, his relation to the company was the same as that of a stranger. This being so, when he took up his journey on the company's private railroad without invitation he did so with no greater rights than an ordinary licensee, taking upon himself all the perils that were incident thereto. "The owner of premises," says Mitchell, J., in *Railroad Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783, "is under no legal duty to keep them free from pitfalls or obstructions for the accommodation of persons who go upon or over them merely for their own convenience or pleasure, even where this is done with his permission. In such case the licensee goes there at his own risk, and, as has often been said, enjoys the license with its concomitant perils." To the same effect, see *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261; *Lingenfelter v. Railway Co.*, 154 Ind. 49, 55 N. E. 1021; *Cannon v. Railway Co.*, 157 Ind. 682, 62 N. E. 8. The complaint states no cause of action.

Judgment reversed and cause remanded, with instructions to sustain appellant's demurrer to the complaint.

## BETTS v. WILMINGTON CITY RY. CO.

(*Superior Court of Delaware, New Castle, Jan. 8, 1902.*)

[53 Atl. Rep. 358.]

**Injury to Street Car Passenger—Sudden Jerk.\***

Where a conductor of a street car fails to stop it at the usual place, as requested by a passenger, but, after passing it, slows up in the middle of a block, so as clearly to invite him to alight, and he attempts to get off, with the knowledge of the conductor, it is the conductor's duty not to cause the car to start up or jerk so as to endanger the passenger's safety.

**Same—Contributory Negligence—Alighting from Moving Car.†**

Whether a passenger, in attempting to get off a slowly moving street car, is guilty of contributory negligence, is a question for the jury, under all the circumstances.

Action on the case by Samuel F. Betts against the Wilmington City Railway Company for personal injuries in alighting from a car on which plaintiff was a passenger. Verdict for defendant.

\*As to the duties of carriers in taking on and setting down passengers, see foot-note appended to *Pittsburgh, C., C. & St. L. Ry. Co. v. Gray* (Ind.), 4 R. R. R. 120, 27 Am. & Eng. R. Cas., N. S., 120.

†See foot-note appended to *Pittsburgh, C., C. & St. L. Ry. Co. v. Gray* (Ind.), 4 R. R. R. 120, 27 Am. & Eng. R. Cas., N. S., 120.

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Argued before LORE, C. J., and SPRUANCE and GRUBB, JJ.

Levi C. Bird and Andrew E. Sanborn, for plaintiff.  
Walter H. Hayes, for defendant.

LORE, C. J. (~~charging~~ jury). Samuel F. Betts, the plaintiff in this action, claims that on the 25th day of August, 1900, he was a passenger on one of the electric street railway cars of the defendant company, on his way from Darby, Pa., to his home in this city; that while coming south on Market street, in this city, before reaching Twelfth street, he stood up, and signaled the conductor of the car to stop by raising his hand and calling out, "Twelfth street;" that the conductor recognized his signal, assented to it by a nod, but did not stop the car until it had nearly reached the middle of the square between Twelfth and Eleventh streets; that the car then stopped there, and, while he was in the act of getting off, the car suddenly started up, whereby he was thrown upon the ground with such force as to break his nose, and bruise and injure his face, hands, and body, so that he has therefrom become quite deaf, and greatly impaired in health and strength. In this suit he claims at your hands damages for the injuries he then received, which he claims resulted from the negligence of the defendant company. The defendant, however, claims that the injuries resulted from the negligence of the plaintiff himself, in that he attempted to get off the car while it was in rapid motion, before the car had stopped, and before it had reached the regular stopping place. The sharp issue is therefore presented, from whose negligence, if any there was, did these injuries result? To enable the plaintiff to recover at all, he must show to your satisfaction, by a preponderance of the evidence, that the negligence which caused the accident, if any there was, was the fault of the defendant company. The burden of proving such negligence is upon the plaintiff. If the defendant company was guilty of no negligence, it is entitled to your verdict, whatever injuries the plaintiff may have received.

It is not disputed in this case that the defendant company was at the time of the accident a common carrier of passengers for hire, and that the plaintiff was rightfully on the car of the company as such passenger. We are asked to instruct you, therefore, as to the respective rights and duties of such common carrier, and also of such passenger. We find the duty of such common carrier to its passengers nowhere better expressed than in one of the decisions of our own state, viz., *Flinn v. Railroad Co.*, 1 *Houst.* 469, which is the leading case in this state on the subject. The court there say: "A common carrier of passengers is liable for injuries to the latter only in case of his negligence. But the law, in its beneficence, will not allow any trifling with the lives or personal safety of human beings, and therefore exacts great care, diligence, and



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skill from those to whose charge, as common carriers, they are committed. Common carriers of passengers are responsible for any negligence resulting in injury to them, and are required, in the preparation, conduct, and management of their means of conveyance, to exercise every degree of care, diligence, and skill which a reasonable man would use under such circumstances. This obligation is imposed on them as a public duty, and by their contract to carry safely, as far as human care and foresight will reasonably admit. A railroad company, using, as it does, the powerful and dangerous agency of steam, is bound to provide skillful and careful servants, competent in every respect for the posts they are appointed to fill in their service." The motive power in that case was steam, but the rule and the reason of the case apply equally to the case at bar, whether the motive power was electricity. A street railway company, in letting its passengers on and off its cars, is bound to stop its cars, and wait a reasonable time for the passengers to get on or off, at its usual stopping places, and also to use and exercise all reasonable care to secure the safety of the passengers. If a conductor fails to stop at the usual stopping place, in compliance with a passenger's request, but, after passing such place, slows up at an unusual stopping place, in such manner as clearly to invite the passenger to alight, and the passenger, under such circumstances, attempts to get off, reasonably within the knowledge of the conductor, it is his duty not to cause the car to start up or jerk so as to endanger the safety of the passenger. While, therefore, the common carrier is held to strict care in the safe transportation of its passengers, yet it must be borne in mind that it by no means is an insurer of their safety, but is only responsible for its own negligence in case of injury. On the other hand, there is a duty resting upon the passenger, to act with prudence, and to use the means provided for his safe transportation, with reasonable circumspection and care; and, if his negligent act contributes to bring about the injury of which he complains, he cannot recover. *Booth, St. Ry. Law, § 229.* It is also the duty of the passenger to see that the car has stopped, and that he may safely get on or off, and also to exercise all reasonable care to avoid danger. Reasonable care would be such care as a man of ordinary prudence would take under similar circumstances to avoid accident. The care should be in proportion to the risk to be incurred in all cases. *Wallace v. Railroad Co., 8 Houst. 551, 18 Atl. 818.* Many authorities hold that it is negligence per se for a passenger to get off a car while it is in motion. That such an act is in itself negligence, independent of other circumstances. The weight of authority, however, seems to be that it is not negligence per se to alight from a slowly moving street car. *Root v. Railway Co. (Iowa) 83 N. W. 904.* Yet, if, from the age, condition of the passenger, and all other circumstances surrounding the case, such an act would be rash, dangerous or

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hazardous, then it would amount to negligence. And if injury resulted from such act, the common carrier would not be liable therefor. Bearing in mind the law as we have thus stated it, you are to determine whether the negligence of the defendant company alone was the cause of the injury complained of, for, if the plaintiff proximately contributed thereto, he cannot recover.

If your verdict should be for the plaintiff, it should be for such reasonable sum of money as will compensate him for his injuries, including therein pain and suffering in the past, and such as may come to him in the future, resulting from this accident, and also for any impairment of ability to earn a living in the future.

Verdict for defendant.

### SYMONDS v. MINNEAPOLIS & ST. L. RY. CO.

(*Supreme Court of Minnesota, Nov. 21, 1902.*)

[92 N. W. Rep. 409.]

#### Passengers on Mixed Trains—Assumption of Risk.\*

Passengers upon mixed trains assume all casual risk and discomforts incident to the movements of such trains, but this does not relieve a railway company from the charge of actionable negligence in the management of mixed trains, or in the condition of the cars in which passengers are to ride.

#### Sufficiency of Evidence.

Upon an examination of the evidence in this case, it is *held* that there was sufficient evidence of negligence on the part of defendant to support the verdict of the jury in plaintiff's favor, and further, that the question of plaintiff's contributory negligence was for the jury.

(Syllabus by the Court.)

Appeal from district court, Le Sueur county; Lorin Cray, Judge.

Action by Sylvester F. Symonds against the Minneapolis & St. Louis Railway Company. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

Albert E. Clarke and W. S. Hammond, for appellant.

M. J. Severance and C. N. Andrews, for respondent.

**COLLINS, J.** This is an action to recover for personal injuries received while plaintiff was a passenger on defendant's line of railway. He had boarded a car, partitioned into two compartments, and called a "combination," which was attached to a long freight train, for the purpose of traveling some 12 or 15 miles. He was thoroughly advised as to the manner of operating freight trains. One of the compartments, about one third of the car, was for the use of the trainmen while the other was for passengers. In the partition

\*As to the liability of carriers for injuries to passengers by jerks or jolts of trains or cars, see monograph attached to *Freeman v. Metropolitan St. Ry. Co. (Mo.)*, 3 R. R. R. 584, 26 Am. & Eng. R. Cas., N. S., 584.

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above referred to was a heavy iron sliding door, suspended from above by rollers, and moving easily on a track. The smaller compartment was in the rear on this day, and plaintiff took his seat in the larger, a few feet from and facing the iron door, which had been pushed back beside the partition and was open. He rode in this manner until he reached Echo station. He then rose to his feet and stepped forward through the doorway into the trainmen's compartment to ask the conductor whether the train would stop at Echo long enough for dinner. There was a sliding door in this compartment, on the side of the car, and the conductor sat upon a chest in front of this door, which was also open. Almost immediately after asking this question, plaintiff, while looking out of the doorway, heard a noise, and discovered that the freight cars in front were being driven back in an unusual and extraordinary manner, and hastened to resume his seat. Just as he was passing through the doorway, the movement of the train threw him forward violently. He seized the door jamb to save himself from falling, and at this time the sliding door shut against the jamb, caught his hand, and caused the injuries complained of. There was some dispute at the trial as to whether the train was moving when plaintiff started towards the smaller compartment, but there was testimony sufficient to sustain a special finding of the jury that the train had fully stopped when plaintiff left his seat and walked through the doorway. This special finding is conclusive upon this court, and is of importance when considering this appeal. Two important questions are presented by the record: First, was there sufficient evidence of negligence on the part of the defendant railway company to warrant the verdict of the jury, which was in plaintiff's favor? And, second, if there was sufficient evidence of defendant's negligence, did it conclusively appear that the plaintiff was guilty of such contributory negligence as would preclude a recovery for the damages he received?

1. It is manifest from the testimony that while about one-third of this car was partitioned off for the use of the trainmen, and was not designed for ordinary occupation by passengers, no attempt was made to exclude them from entering this compartment at any time, and remaining there while the train was in motion. The seats provided for the use of passengers were in the larger compartment, but it appeared that passengers not only used the smaller as a means of egress and ingress from and to the larger from station platforms, but that they occupied it for smoking and other purposes, and at times for sitting. No effort was made upon the part of the defendant to controvert the testimony upon these points, or to show that any rule or regulation had ever been adopted which would prevent passengers from occupying or passing through this part of the car if they felt so inclined. Even if there had been a rule prohibiting passengers from riding

therein that fact would not absolve the defendant company from the duty of care towards passengers who habitually disregarded the rule, and were permitted by defendant company to ride there. *Jones v. Railway Co.*, 43 Minn. 279, 45 N. W. 444, 44 Am. & Eng. R. Cas. 357. See, also, *Jacobus v. Railway Co.*, 20 Minn. 126 (Gill 110), 18 Am. Rep. 360. It is true that this was a mixed train, but carriers of passengers are bound to use the best precautions in known practical use to secure the safety of their passengers, whether they are carried upon mixed or exclusively passenger trains. But this does not require that railway companies shall adopt on mixed all the appliances which they are bound to use on passenger trains. It merely demands the highest degree of care consistent with the practical operation of the mixed trains. *Oviatt v. Railway Co.*, 43 Minn. 300, 45 N. W. 436. It is also a fact that mixed trains cannot be managed and controlled as are passenger trains, and, as a consequence, accidents occur more frequently. The bumping or collision of the cars while slacking, and what is known as "taking out the slack," on one of these trains, and sudden jars and jerks, are exceedingly annoying, oftentimes risky, but are common and unavoidable in the running of mixed trains, while they are almost unknown and are inexcusable in those used exclusively for passengers. The latter must, of course, assume all these casual risks and disagreeable incidents, but this rule does not relieve defendant of the charge of actionable negligence in its management of the train in question, or in maintaining a door in an unfastened and dangerous condition. If the plaintiff was lawfully within the range of the movements of such a door, how can it be said that the defendant was not negligent in permitting it to remain in a condition dangerous to those who might be permitted to pass through the doorway while the train was either stopping or starting, and liable to throw passengers off their feet? From the testimony it clearly appears that the jerking and bumping of the train, which unquestionably caused the door to shut against plaintiff's hand, was extraordinary and unusual; one of the witnesses testifying that he thought the car was being knocked off the track. The jury had the right to conclude that the management of the train was improper, in view of the dangerous and negligent condition of the door, and that the sudden shutting of the latter was the proximate cause of plaintiff's injury.

2. It is contended that the plaintiff was guilty of contributory negligence when he rose from his seat and stepped through the doorway to talk with the conductor, but this claim is largely predicated upon the unwarranted assertion that he had no right to go into the trainmen's compartment. It is true that he might have spoken to the conductor without rising, but it does not follow that he was obliged to do this, in order to escape the charge of contributory negligence, or that he would be guilty of such negligence if he passed from his



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seat to that part of the car in which the conductor sat. It was not negligence for him to leave his seat while the train was standing still; nor was it negligence for him to pass into that part of the car designed for trainmen, but used, as before stated, by passengers for going in and out of the car, and for smoking and other purposes. Another passenger, who had been sitting with plaintiff, passed through this compartment and out onto the platform of the car immediately before he asked the question about dinner, without a word of remonstrance from the conductor. Nor did the conductor, when plaintiff passed through the door and asked the question, suggest to him that he was in a part of the car not properly to be occupied by passengers. While no definite and fixed rule can be laid down by which to determine when passengers upon a train of this character are guilty of negligence in leaving their seats or in going into another compartment, the plaintiff was not conclusively shown to have been so negligent as to prevent a recovery for the injury received. It follows that the question of plaintiff's contributory negligence was for the jury to pass upon.

3. We have examined the assignments of error going to the admission or rejection of testimony at the trial, and find none which need special attention, for no prejudicial error appears in the rulings.

Order affirmed.

On Petition for Rehearing.

(Dec. 8, 1902.)

PER CURIAM. By defendant's petition we are informed that the iron door which closed upon plaintiff's hand and caused the injury was in the side of the car, and not in the partition between the compartments, as stated in the opinion. This was not made clear by plaintiff's testimony, and, from the fact that he had one hand upon a seat in the passengers' compartment when the door caught the other, we rather naturally, and, we think, excusably, assumed that the door in question was in the partition, and so stated. However, the exact location of the door is wholly immaterial. The danger to be anticipated from it is apparent, when we consider that the plaintiff had gone so far into the passengers' compartment when the cars came together that one hand was caught, while he had the other upon the seat in which he had been sitting but a short time before. He certainly was (to use an expression from the opinion) "within the range of the movements of such a door" when injured. This being the fact, it is of no consequence whatever, under the law of this case, that the dangerous and unfastened door was in the side of the car, instead of in the partition.

Petition denied.

KANSAS CITY, M. & B. R. CO. *v.* FOSTER.

(Supreme Court of Alabama, June 28, 1902.)

[32 So. Rep. 773.]

**Carriers of Passengers—Wrong Ticket.**

The wrong committed by a ticket agent in giving a ticket to Y. only to a passenger buying a ticket to I., the agent knowing that yellow fever was prevalent near Y., and the danger and inconvenience of going about there, is the proximate cause of the passenger's suffering on account thereof; he being put off at Y. and not having money to buy a ticket to his destination.

**Same—Same—Liability for Act of Agent of Connecting Carrier.\***

The ticket agent of one carrier is the agent of a connecting carrier, so as to make the latter liable for his act in giving a passenger a ticket to Y. only, when buying a ticket to I., both points being on latter company's road, but I. being more distant, so that the passenger was put off at Y.; the latter company having recognized tickets sold to points on its line by the former company, and received from it its proportional part of the price of such tickets, and having received said passenger's ticket for transportation to Y.

**Measure of Damages.†**

The measure of damages of a passenger, who, buying a ticket to one point, is given one to a less distant point, where he is ejected, is not confined to the mere cost of transportation between the two points.

**Appeal from city court of Birmingham; Chas. A. Senn, Judge.**

**Action by Edwin H. Foster against the Kansas City,**

\*See *Barkman v. Pennsylvania R. Co.* (C. C. N. J.), 12 Am. & Eng. R. Cas., N. S., 250, and note, 252 et seq.; *Mathews v. Atchison, T. & S. F. R. Co.* (Kan.), 12 Am. & Eng. R. Cas., N. S., 255; *St. Clair v. Kansas City, M. & B. R. Co.* (Miss.), 20 Am. & Eng. R. Cas., N. S., 426; *Pennsylvania Railroad Co. v. Jones* (U. S.), 2 Am. & Eng. R. Cas., N. S., 390; *Texas & P. R. Co. v. Hawkins* (Tex. Civ. App.), 2 Am. & Eng. R. Cas., N. S., 212; *Alabama & V. Ry. Co. v. Holmes* (Miss.), 10 Am. & Eng. R. Cas., N. S., 270; *Matthews v. Charleston & S. R. Co.* (S. Car.), 2 Am. & Eng. R. Cas., N. S., 109; *Baltimore, C. & A. Ry. Co. v. Kirby* (Md.), 18 Am. & Eng. R. Cas., N. S., 248; *Chamberlain v. Lake Shore & M. S. Ry. Co.* (Mich.), 17 Am. & Eng. R. Cas., N. S., 241; *Spink v. Louisville & N. R. Co.* (Ky.), 16 Am. & Eng. R. Cas., N. S., 86; *Wenz v. Savannah, F. & W. Ry. Co.* (Ga.), 15 Am. & Eng. R. Cas., N. S., 844; *Winters v. Cowen* (C. C. Ohio), 12 Am. & Eng. R. Cas., N. S., 40.

†See generally, foot-note appended to *Yazoo & M. V. R. Co. v. Rodgers* (Miss.), 2 R. R. 161, 25 Am. & Eng. R. Cas., N. S., 161. See also, foot-note appended to *Brown v. Rapid Ry. Co.* (Mich.), 3 R. R. R. 819, 26 Am. & Eng. R. Cas., N. S., 819; *Alabama & V. Ry. Co. v. Bell* (Miss.), 21 Am. & Eng. R. Cas., N. S., 155; *St. Louis S. W. Ry. Co. v. Harper* (Ark.), 21 Am. & Eng. R. Cas., N. S., 77; *Procter v. Southern California Ry. Co.* (Cal.), 19 Am. & Eng. R. Cas., N. S., 77; *Lexington & E. Ry. Co. v. Lyons* (Ky.), 11 Am. & Eng. R. Cas., N. S., 212; *Louisville & N. R. Co. v. Ray* (Tenn.), 11 Am. & Eng. R. Cas., N. S., 174; *Zagelmeyer v. Cincinnati, S. & M. R. Co.* (Mich.), 2 Am. & Eng. R. Cas., N. S., 161; *Laird v. Pittsburg Traction Co.* (Pa. St.), 2 Am. & Eng. R. Cas., N. S., 161; *Schmitt v. Milwaukee St. R. Co.* (Wis.), 2 Am. & Eng. R. Cas., N. S., 161; *Gulf, C. & S. F. R. Co. v. Sparger* (Tex. Civ. App.), 2 Am. & Eng. R. Cas., N. S., 161; *Cox v. Los Angeles Ter. R. Co.* (Cal.), 2 Am. & Eng. R. Cas., N. S., 162; *St. Louis S. W. R. Co. v. Huffman* (Tex. Civ. App.), 2 Am. & Eng. R. Cas., N. S., 162; *Charleston & S. R. Co. v. Varnadore* (Ga.), 2 Am. & Eng. R. Cas., N. S., 162.

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Memphis & Birmingham Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The complaint contained six counts. Under the opinion on the present appeal, it is only necessary to set out the third count of the complaint, which was as follows: “(3) The plaintiff further claims of the defendant the sum of eighteen hundred (\$1,800) dollars, as damages, because of the following state of facts: And plaintiff avers that on, to wit, the 13th day of September, 1897, plaintiff applied to and paid defendant’s agent at Waco, in the state of Texas, whose name is to plaintiff unknown, for a ticket from Memphis, in the state of Tennessee, to Birmingham, in the state of Alabama, over defendant’s railroad extending between those points. And the plaintiff avers that the defendant’s said agent, instead of furnishing plaintiff with a ticket from Memphis to Birmingham, as it was his duty to do, negligently furnished plaintiff with a ticket from Memphis to Byhalia, a point on defendant’s said road in the state of Mississippi between Memphis and Birmingham.

“And plaintiff avers that the ticket which he received from defendant’s said agent was quite long, consisting of several coupons and containing a great deal of printed matter, that when said ticket was delivered to him by defendant’s said agent he asked said agent if he was sure said ticket was to Birmingham, that in reply said agent stated that it was all right for Birmingham, and pointed out to plaintiff the word “Birmingham” between punch marks on several of the coupons composing said ticket; and the baggage master at the Waco depot having (upon having said ticket exhibited to him) checked plaintiff’s trunk from Waco to Birmingham on said ticket; and plaintiff, having had little experience with tickets of this kind, and being at that time hurried in order to be ready to leave on the train for which he had purchased said ticket, received said ticket without further examination, feeling assured that it was such as he had asked for, and got upon the said train without observing that the said ticket was not correctly made out from Memphis to Birmingham.

“And plaintiff avers that at about 9 o’clock p. m. on to wit, the 14th day of September, 1897, he boarded, at Memphis, Tennessee, defendant’s passenger train, which was to run from Memphis to Birmingham, for the purpose of coming to Birmingham. And plaintiff avers that when the defendant’s agent who was in charge of said train (whose name is to plaintiff unknown) came to take up the fare plaintiff delivered to him the ticket which the defendant’s said agent at Waco had furnished him as aforesaid. And the plaintiff avers that upon examining said ticket, the defendant’s said agent in charge of said train found that it was a ticket from Memphis to Byhalia, a point on defendant’s road in the state of Mississippi, between Memphis and Birmingham; that it was not to Birmingham, as plaintiff had been informed,

and as he believed up to that time. And plaintiff avers that the defendant's said agent in charge of said train would not allow plaintiff to travel to Birmingham on said ticket. And plaintiff, not having sufficient money with which to pay the fare from Byhalia to Birmingham, defendant's said agent put plaintiff off of the said train at Byhalia in the state of Mississippi.

“(And plaintiff avers that when he was put off it was about ten o'clock at night, was during the time when the yellow fever was prevailing in many parts of the country, including that in which Byhalia is situated, and the town of Byhalia was quarantined against all other places.) (When plaintiff was put off of said train as aforesaid he was met by an armed officer and other citizens of Byhalia, who told him that he should not enter or stop at Byhalia, and commanded him to proceed immediately on his journey on foot, and upon plaintiff's hesitating to do so, greatly frightened, abused and mortified plaintiff by their harsh and severe language and treatment of him.) (And plaintiff avers that it was with the greatest difficulty and after much trouble, delay, opposition, alarm and mortification to himself that he obtained leave to pass the night at Byhalia and he was forced and required to leave the town the following morning.) And the plaintiff avers that the defendant's said agent, when he sold the plaintiff the said ticket knew that the yellow fever was prevailing, and knew of the danger and inconvenience of making one's way through the state of Mississippi through which said defendant's said road passes. And plaintiff avers that he had not with him at that time sufficient funds with which to purchase a ticket or pay the railroad fare from Byhalia to Birmingham, and the defendant's agent, who was in charge of said train, knew this likewise, when he put plaintiff off of the said train. (And plaintiff avers that being unacquainted with any one in Byhalia, he suffered great inconvenience, hardship and mortification from the lack of money as aforesaid, and it was with great difficulty, delay and trouble and only by pledging and depositing as collateral security certain valuables which he had with him, that he was able to obtain sufficient, and then barely sufficient money with which to pay his expenses and fare to Birmingham.) And plaintiff avers that by and from being wrongfully put off said train, as aforesaid, he suffered great fear and uneasiness because of the supposed prevalence of yellow fever in that locality and his exposure thereto.

“(And plaintiff avers that he had previously ordered his mail sent to Tuscaloosa, Alabama, where it was awaiting him and where he had intended to go immediately upon his arrival in Birmingham. And plaintiff avers that being put off at Byhalia as aforesaid, so delayed him in arriving at Birmingham, that when he did at last arrive at Birmingham, he had not time to go to Tuscaloosa as he had intended, but was

detained in Birmingham by business as he would not have been detained had he not been put off of defendant's train at Byhalia and his arrival in Birmingham delayed as aforesaid. And plaintiff avers that there were waiting him at Tuscaloosa letters of great importance, informing him of the illness of his wife who was in the state of Colorado, and plaintiff avers that by being put off of the defendant's said train as aforesaid, the receipt of said letters was delayed, and he was prevented from providing promptly for having his wife, who was among strangers, properly nursed and treated, that the delay in such provision increased and aggravated his wife's illness and caused her to have to remain during a long illness in the state of Colorado, instead of coming home to her family, and increased greatly the expense which her illness entailed on plaintiff. And plaintiff avers that the said delay, as aforesaid, caused his wife to have a much more severe and serious spell of illness than she would have had had the plaintiff been able to provide promptly for her nursing and treatment, as he could and would have done had he not been wrongfully put off of defendant's train as aforesaid; and the increased severity of her illness has caused and forced plaintiff to expend large sums of money in and about having his wife treated, nursed and cared for, and has seriously and permanently injured, weakened, and undermined the health of plaintiff's wife.) By all of which plaintiff has been damaged in the sum of to wit: eighteen hundred (\$1,800) dollars and therefore he sues."

The defendants moved to strike the portions of the third count of the complaint which are in parentheses. The portions of said count to which motions to strike were overruled are set out in the opinion. The motion to strike was sustained as to the other portions which are in parentheses. The defendant pleaded the general issue and also filed a plea setting up the contributory negligence of the plaintiff in that he failed to read or notice with sufficient care and attention his ticket. The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

The court at the request of the plaintiff gave to the jury the following written charges: "(1) If the jury believe from the evidence that the plaintiff was forced to leave the train at Byhalia by reason of the negligent act of the ticket agent at Waco, provided you find from the evidence such agent to be defendant's agent, they will return their verdict in his favor and assess his damages at such sum as will reasonably compensate him for any additional expenditure of money, incurred by plaintiff on account of such expulsion, for any physical discomfort or inconvenience and for any mental anguish, indignity, humiliation or annoyance which the jury may find from the evidence proximately resulted to the plaintiff on account of such mistake on the part of the agent at Waco—provided the jury find from the evidence that the



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agent at Waco was the agent of defendant. (2) While the jury cannot assess any damages on account of the expulsion from the train, taken alone and of itself, they may assess such damages as the jury may find proximately resulted to the plaintiff from the negligent act of the Waco agent,—provided you find from the evidence such agent to be defendant's agent—including expenses, any physical discomfort or distress, and any mental anguish, distress, annoyance, or humiliation or indignity, which resulted as an immediate consequence of having to leave the train at Byhalia."

The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following charges requested by it: "(1) The court charges the jury that what happened to the plaintiff after he left the train is not the proximate result of the mistake in the ticket and for such happenings the plaintiff cannot recover in this action. (2) The court charges the jury that if they believe the evidence they must find for the defendant. (3) The court charges the jury that if they believe the evidence they cannot find for the plaintiff under the third count of the complaint. (4) The court charges the jury that if they believe the evidence they must find that there was nothing in the character of the expulsion of the plaintiff from the train which tended to humiliate or degrade the plaintiff. (5) The court charges the jury that if they believe the evidence they cannot find that the defendant was guilty of negligence in putting the plaintiff off the train where quarantine regulations were in force, if they believe from the evidence that such regulations were in force there. (6) It was the duty of the plaintiff to submit to all reasonable and proper quarantine regulations after he was put off the train and for such he is not entitled to an award of damages. (7) If you believe the evidence you must find that the ticket agent issuing the ticket to the plaintiff at Waco, Texas, was not the agent of the defendant. (8) The court charges the jury that it was the duty of the plaintiff before being ejected from the train, to have done all that a reasonable and prudent and careful man would have done under the circumstances of the situation to have properly avoided expulsion from the train. (9) You are not authorized under the evidence if you believe it, to award to the plaintiff any more than the money or value be expended in procuring a ticket from Byhalia to Birmingham. (10) The court charges the jury that if they believe the evidence the plaintiff is only entitled to recover the price paid for his ticket from Byhalia to Birmingham, and reasonable compensation for the trouble, delay and inconvenience he suffered in his effort to reach Birmingham from Byhalia. (11) The court charges the jury that if they believe the evidence they must find that in issuing the ticket to the plaintiff at Waco, Texas, the ticket agent, issuing such ticket, was in the performance of no duty he owed to the defendant and for his negligence

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in issuing such ticket the defendant is not liable. (12) The court charges the jury that if they believe the evidence they must find that the ticket agent at Waco, Texas, in issuing the ticket to the plaintiff was in the performance of a duty he owed to the St. Louis & Southwestern Railway Company and for any mistake of such agent in the issuance the plaintiff has a right of action against such railway company, and not against the defendant. (13) The court charges the jury that if they believe the evidence they must find that the defendant had fully performed all the duty he owed to the plaintiff when it carried him safely to Byhalia, Mississippi."

There were verdict and judgment for the plaintiff, assessing his damages at \$300. Thereafter the defendant made a motion for a new trial, upon the ground that the verdict of the jury was contrary to the law and the evidence, that the damages assessed were excessive, and that the court erred in its rulings upon the charges requested. This motion was overruled and the defendant duly excepted. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Walker, Tillman, Campbell & Porter, for appellant.

Henry N. Jones and Robison Brown, for appellee.

HARALSON, J. The complaint contained six counts. The ones numbered 2 and 5 were withdrawn and abandoned by plaintiff, and the court instructed the jury, at the instance of defendant, that they could not find for the plaintiff under the first, fourth and sixth counts. We need not, therefore, consider any of the rulings of the court on motions to strike certain parts of these counts, and on the demurrers interposed to them. There was left alone in the complaint, the third count, on which, after rulings on motions to strike certain parts thereof had been overruled and others sustained, issue was taken and the cause tried.

1. The portions of said count, which the defendant moved to strike and which were overruled were, (1) "And plaintiff avers, that it was with the greatest difficulty and after much trouble, delay, opposition, alarm and mortification to himself, that he obtained leave to pass the night at Byhalia, and he was forced and required to leave the town the next morning. (2) And plaintiff avers, that when he was put off, it was during the time and when the yellow fever was prevailing in many parts of the country, including that in which Byhalia is situated, and the town of Byhalia was quarantined against all other places. (3) And plaintiff further avers, that by and from being wrongfully put off of defendant's said train, as aforesaid, he suffered great fear and uneasiness because of the supposed prevalence of yellow fever in that locality, and his exposure to it."

The count contained the averment, that the defendant's agent at Waco, Texas, sold him his ticket, and when he sold

it to him, said agent knew that the yellow fever was prevailing, and knew of the danger and inconvenience of making his way through the state of Mississippi, through which defendant's said road passed; that plaintiff had not with him at that time sufficient funds with which to purchase a ticket, or pay the railroad fare from Byhalia to Birmingham, and defendant's agent who was in charge of said train knew this fact, when he put plaintiff off of said train.

It is sometimes difficult to determine what, in law, is and what is not proximate cause of injury. In *Armstrong v. Railway Co.*, 123 Ala. 233, 26 South. 349, the rule was stated to be, "That a person guilty of negligence, should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind." *Railroad Co. v. Quick*, 125 Ala. 553, 28 South. 14; *Railway Co. v. Mutch*, 97 Ala. 194, 11 South. 894, 21 L. R. A. 316, 38 Am. St. Rep. 179. Here, the wrong committed by the agent at Waco, and the alleged damage, are known by common experience to be naturally and usually in sequence, and we are impressed, that the court committed no error in overruling the motion to strike the parts of the complaint objected to.

2. There are a great many errors assigned, but appellant's counsel very correctly state in brief, they each substantially raise one or the other of two propositions, that the appellant is not liable to appellee for the mistake of the St. Louis Southwestern Railway Company's agent at Waco, Texas, or, if it should be held that appellant is liable for the mistake of such agent, appellee's recovery in this action must be limited to the cost of transportation between Byhalia and Birmingham.

The first inquiry is, was the ticket agent at Waco, Texas, the agent of the defendant in selling the plaintiff his ticket from Memphis to Birmingham, as is alleged he was. It appears that the two roads,—the one from Waco to Memphis, and the other from that point to Birmingham,—were connecting lines and that the plaintiff purchased a coupon through ticket from Waco to Birmingham. In answer to interrogatories propounded by plaintiff to defendant, the company answered, that the conduct on defendant's road, did receive from plaintiff on the 14th September, 1897, a ticket or coupon from Memphis to Byhalia, said ticket or coupon purporting to have been issued by the St. Louis Southwestern Railway Company; that it was impossible for it to state whether defendant had, prior to that time, placed on sale at Waco, tickets over its railroad from Memphis to Birmingham; that defendant itself, did not place such tickets on sale at Waco, and had no officer or agent at that point; that a railroad com-

pany frequently issues and places on sale, tickets reading from points on its line to points on the lines of other roads, and often, with coupons reading over several lines of roads between initial point and destination; that defendant could not say that it knew that tickets like the one received by said conductor, were on sale at Waco; that it, however, did know, that the St. Louis Southwestern road sometimes issued and placed on sale, tickets with coupons attached, reading to points on the line of defendant, and that that road collected the value of the entire ticket, remitting to defendant the amount due it, and such tickets had been issued and placed on sale by said St. Louis Southwestern Company, prior to September 14, 1897.

The general rule prevailing in this country, as is well understood is, where there are connecting roads as here, that in the absence of a special contract, or some relation between them, each is liable, only for a loss or injury on his particular line or route. *Railroad Co. v. Moore*, 51 Ala. 394; *Railway Co. v. Culver*, 75 Ala. 587, 51 Am. Rep. 483; *Jones v. Railroad Co.*, 89 Ala. 376, 8 South. 61; *Railway Co. v. Hughart*, 90 Ala. 36, 8 South. 62.

In *Express Co. v. Hess*, 53 Ala. 19, it appeared that the Adams Express Company and the Southern, connected at a point from which the one secured goods destined for points on the line of the other, and it was held, that this fact, constituted the one company the agent of the other, as to such freight, and its consignor and consignee, and if the company finally delivering the goods does not deliver them in the condition in which they were received by its agent,—the company who issued the bill of lading,—it must account for the injury. The same rule is in reason applicable in the sale of tickets to travelers over connecting lines. Hutchinson states the rule in such cases to the same effect, that "When the passenger has received from the carrier a number of coupon tickets, one for his passage over the route of the first, and others as passports over the lines of succeeding carriers, \* \* \* such tickets are held not to import a contract on the part of the first carrier, from whom they are received, to be responsible for the carriage of passengers beyond its own line. In such cases, the first carrier is considered rather in the light of an agent for the succeeding carriers, than as undertaking for the faithful discharge of their duty, and the coupons as in the nature of separate tickets on behalf of the successive carriers, and binding upon them in the same manner as if issued by themselves." He cites numerous authorities to sustain the text. *Hutch. Carr.* p. 662, § 578.

In this case, the defendant's own evidence, with nothing in conflict with it, is sufficient to sustain the agency of the Waco ticket agent, on behalf of defendant, to sell the ticket to plaintiff. The fact that the defendant had no general agent or office at that point, and itself, did not place tickets there for

sale, is a matter of no consequence, if the other road with defendant's approval acted in this behalf for it. It was shown, the defendant recognized and ratified the agency in receiving the ticket from plaintiff in payment of his fare on its own line, from Memphis to Byhalia.

3. "The law, settled by the great weight of authority is, that the face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the company. \* \* \* The passenger must submit to the inconvenience of either paying his fare or ejection, and rely upon his remedy in damages against the company for the negligent mistake of the ticket agent."

4 Elliott, R. R. § 1594. The author adds: "It does not necessarily follow, however, that the railroad company may not be liable where the passenger has, in fact, a right to his passage at the ticket rate, and he is afforded no opportunity to get a ticket, or is misled, or given a wrong or defective ticket by the company's agent, or the like." Hutchinson, taking the same view, holds, on the authority of cases he cites, that in the action for the recovery of damages sustained, the action must be for a breach of the contract. Hutch. Carr. p. 674, § 580h. Mr. Elliott, referring to the authorities which hold that the passenger's remedy is an action for breach of the contract,—without denying the right to sue in contract,—says: "It may be that some of the cases to which we have just referred are contrary to the weight of authority, in holding that the only remedy is an action for breach of the contract, and in stating the measure of damages, but whether the action be in contract or in tort,—for the breach of a contract or for the violation of a duty imposed by law,—the gist of the action cannot well be the expulsion of the traveler, where there is no unnecessary force, in accordance with the rules of the company, when he had no ticket or evidence of his right to transportation valid on its face, or such as those rules reasonably require, and refuses to pay his fare. The wrong lies back of that, and it is well settled, that a complaint proceeding upon one theory, will not authorize a recovery upon another and entirely distinct and independent theory." Elliott, R. R. § 1594.

Mr. Freeman in note to Com. v. Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465, 475, says: "If by mistake of one of the officers of the company, he is not furnished with a proper ticket or check, evidencing his right to be carried to his destination, his right nevertheless remains, and if for want of the requisite evidence of that right, another servant of the company refuses to carry him without another payment of fare, the contract is broken, and he has a complete right of action for all damages resulting from such breach. \* \* \* He (the traveler) should either pay the fare demanded or quit the train; and in either case we think he ought to recover, as part of his damages, reasonable compensation for the indignity



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put upon him by the company through the default of its servant," etc. *McGhee v. Reynolds*, 117 Ala. 419, 23 South. 68.

4. The count in this case is treated by defendant in the demurrer interposed, as one in contract and not in tort. Generally, the damages to which a passenger is entitled who has been injured by the negligence of the carrier, are measured by the rule of compensation; but, as Mr. Hutchinson observes, "the elements which enter into the question of compensation are so various, and in themselves so uncertain, that it furnishes in most cases only a rule for approximation of the actual damage, and must, after all, be left to the sound discretion of those whose province it is to decide the amount. Certain principles, however, have been settled as to what may be properly included within the meaning of the term 'compensation' which will serve as guides in the calculation. One of these rules is that the compensation of the injured party will not be confined to his mere pecuniary loss, but may embrace recompense for the pain and suffering of both body and mind which have resulted from the injury." *Telegraph Co. v. Adair*, 115 Ala. 441, 22 South. 73; *Railroad Co. v. Binion*, 107 Ala. 645, 18 South. 75.

We hold, therefore, that the measure of damages, is not limited, as contended by defendant, to the cost of transportation from Byhalia to Birmingham.

It may be proper to add, that we have found it unnecessary to decide in this case, whether the plaintiff is confined for such damages as he claims to a suit on the contract, such as is admitted this one is, and cannot sue in tort, since it is nowhere disputed that an action in contract may be maintained.

The only demurrer to the third count, was that it joined with an action in tort as set up in other counts, the third being in contract. But this objection cannot be considered, since all the other counts, in the progress of the trial, were either withdrawn by plaintiff, or the court charged there could be no recovery on them, as was stated in the first part of the opinion.

5. We have considered the only errors assigned, which have been insisted on in argument, except on the overruling of the motion for a new trial; and we have found nothing, which in our judgment would justify us in setting the judgment aside, on any of the grounds urged.

Affirmed.

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SMALLEY *v.* DETROIT & M. RY. CO.

(*Supreme Court of Michigan, Oct. 28, 1902.*)

[91 N. W. Rep. 1027.]

**Injury to Alighting Passenger—Sudden Stoppage of Train—Contributory Negligence.**

A passenger started to leave a crowded railway train during its stop at a station, but when she reached the platform, holding a valise in

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one hand and the train of her dress in the other, the train had started; and the brakeman, on being informed that she desired to alight, pulled the bell rope, and the train stopped suddenly, throwing the passenger off and injuring her: *held*, that she was not guilty of contributory negligence, as a matter of law, in not returning to the car or holding to the railing, but that the question was for the jury.

**Same—Same—Negligence—Question for Jury.\***

Whether a railway train crew were guilty of negligence in stopping a train so suddenly that a passenger was injured, *held*, under the evidence, to be a question for the jury.

**Error to circuit court, Bay county; Theodore F. Shepard, Judge.**

**Action by Juna E. Smalley against the Detroit & Mackinac Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.**

On Sunday August 25, 1901, defendant ran an excursion train from Bay City to Alpena. Plaintiff was a passenger on the return trip from Alpena, and designed to alight from the train at Pinconning, where she resided. The train was composed of an engine and ten cars. There was a double train crew, consisting of one conductor and an assistant, two brakemen, and a baggageman, who had no baggage to handle, and assisted in the conduct of the train by repeating the conductor's signals to the engineer. After making the stop, the "all-right" signals were passed from man to man along up from the rear of the train, and finally, as given by the conductor, were confirmed by the baggage master, standing in the baggage car, where he could see the engineer and conductor. The train was crowded, and passengers were standing in the aisles. The train arrived at Pinconning at 9:30 p. m. Plaintiff, with her valise and umbrella, was seated near the middle of the fourth car from the engine. A man sat in the same seat, next to the aisle. As soon as the train stopped, plaintiff, according to her own testimony and that of others, arose from the seat and started towards the front platform of the car, intending to alight. She made due effort to reach the platform in time. She was somewhat obstructed by the man in the seat with her, and by others standing in the aisle. On arriving at the door, the train had started. The brakeman stood upon the platform and asked if she desired to alight. She informed him that she did. She was then holding her umbrella and valise in one hand, and the train of her dress in the other. Without warning or assisting her, he immediately pulled the cord to signal the engineer to stop. He testified that he received no response to this signal, and stepped inside the car ahead, and pulled the cord there. The engineer suddenly stopped the train, and the plaintiff was thrown off and injured. There was a conflict of evidence as

\*As to the liability of carriers for injuries to passengers by jerks and jolts of train or cars, see monograph appended to *Freeman v. Metropolitan St. Ry. Co. (Mo.)*, 3 R. R. R. 584, 26 Am. & Eng. R. Cas., N. S., 584.

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to the time during which the train stopped at the station for passengers to alight. The passenger in front of plaintiff testified that the train started while she stood upon the lower step. At this time plaintiff was approaching the front door of the car as rapidly as she could. Plaintiff recovered verdict and judgment.

T. A. E. & J. C. Weadock, for appellant.

Isaac A. Gilbert (De Vere Hall, of counsel), for appellee.

GRANT, J. (after stating the facts). 1. The negligence alleged is the failure to stop the train a reasonable length of time for her to alight, and the sudden stoppage of the train without notice or warning, or giving her sufficient time to re-enter the car. It is admitted that no warning was given, but it is insisted that she knew of the danger, and was herself negligent in not re-entering the car, or taking reasonable precautions to protect herself. The conflict of testimony upon the length of time the train stopped rendered the question a proper one to submit to a jury. Every passenger is entitled to sufficient time within which to alight after the train has stopped. *Thomp. Neg.* § 2876. It is also the duty of the passenger to move with reasonable promptness and speed. If railroad companies see fit to permit their cars to be crowded beyond their capacity, either upon excursions or otherwise, they are bound to see that passengers have a reasonable time, and are afforded reasonable facilities, to extricate themselves from the crowd and alight. The length of time will depend upon circumstances. Where the train is crowded and passengers are occupying the aisles, a longer time is required than when the train is occupied with the ordinary number of passengers. Whether, as a matter of law, the brakeman, under his own testimony, was guilty of negligence in giving no warning to or taking no steps to protect the plaintiff before stopping the train, we need not determine. The question of negligence was left to the jury. If the conduct of the brakeman was negligence per se, the defendant has no cause of complaint because it was left to the jury. When a passenger has reached the platform in his efforts to alight, and finds the train moving, it is negligence to cause the train to be so suddenly stopped as to throw a passenger down, when no reasonable effort has been made to secure his safety. The evidence upon all these points was sufficient to justify the court in submitting the question of the defendant's negligence to the jury.

2. The question of contributory negligence was properly left to the jury. Plaintiff was notified and invited to alight. According to her evidence, she had exercised diligence in moving to the platform for that purpose. Arriving upon the platform, she found the train in motion. Instantly the brakeman signaled the engineer to stop. Evidently it was but a few seconds between her informing the brakeman that she desired

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to alight and the sudden stoppage of the train. The brakeman acted in great haste. The risk of stopping a train under these circumstances was not one of the risks assumed by travelers. We cannot say that she was guilty of contributory negligence in not attempting to re-enter the car, or to let go of her dress and take hold of the railing to protect herself. Her conduct, in view of all the testimony, became a question for the scrutiny of the jury. It cannot be said that the average prudent person would have acted differently from what she did, in view of the entire surroundings. It is unnecessary to discuss the facts further. The case is squarely within *Strand v. Railway Co.*, 64 Mich. 216, 31 N. W. 184.

3. The learned counsel for defendant have selected a few isolated sentences from the charge of the court, and allege error upon them. When read in connection with the entire charge, they become harmless, even if they were erroneous. The learned judge very clearly in his charge, read as a whole, left to the jury the two questions of negligence and contributory negligence, with ample evidence on which to sustain the conclusions reached by the jury.

The judgment is affirmed. The other justices concurred.

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BROWN v. ATLANTA & C. AIR LINE RY. CO.

(*Supreme Court of North Carolina, Dec., 1902.*)

[42 S. E. Rep. 911.]

**Motion for Nonsuit.**

Notwithstanding the provision of Acts 1897, c. 109, for motion for nonsuit at the end of plaintiff's evidence, such a motion, in the nature of a demurrer to the evidence, may be made by defendant after introducing evidence, his evidence, however, not to be considered thereon.

**Injury to Employee—Liability for Negligence of Lessee.\***

A railroad company, which leases its road, as authorized by its charter, is liable to an employee of the lessee, injured through the lessee's negligence.

Cook, J., dissenting.

Appeal from superior court, Mecklenburg county; Coble, Judge.

Action by J. B. Brown against the Atlanta & Charlotte Air Line Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. F. Bason, for appellant.

Burwell, Walker & Cansler, for appellee.

**MONTGOMERY, J.** This action was brought by the plaintiff to recover damages for personal injuries sustained by him while in the service of the Southern Railway Company, the

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\*See foot-note appended to *Sias v. Rochester Ry. Co.* (N. Y.), 1 R. R. R. 167, 24 Am. & Eng. R. Cas., N. S., 167.

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lessee of the defendant, the Atlanta & Charlotte Air Line Railway Company. The defendant, after pleading contributory negligence on the part of the plaintiff, for a further answer and defense denied its liability on the ground that it had leased the property to the Southern Railway Company, and was not responsible for the tortious acts of its lessee. The language of that part of the answer was in these words: "(12) And for a further answer and defense to said action, the defendant says that, having leased and conveyed its railroad, with all its property, rights, and franchises, to the lessee, the Southern Railway Company, as alleged in plaintiff's complaint, this defendant, at the time of the injury to plaintiff, had no control nor power over the said railroad, nor over the management or operation of the same. It had deprived itself of its property, rights, and franchises with the consent of the state, which had conferred upon it in its charter the right to convey and lease its railroad and all its property, right, and franchises granted in its charter, except the franchises to be and exist as a corporation. That, in view of the foregoing, as it is advised, it cannot be held, and is not liable in law, for the result of any conduct or alleged misconduct of its lessee, the Southern Railway Company, towards the plaintiff, in its operation of the said railroad. Defendant further says that it is advised that to hold it liable in this action, and to take from it its property in satisfaction of any judgment which may be recovered in the same, will be to deprive it of its property without due process of law, and in violation of the fourteenth amendment to the constitution of the United States." At the close of the evidence "the defendant moved for a nonsuit upon the ground, as it appeared from the evidence, that this action was prosecuted against the defendant, the Atlanta & Charlotte Railway Company, the lessor, for the tort committed by the Southern Railway Company, its lessee, in the operation of its trains over the leased road." The motion was overruled, a judgment in favor of the plaintiff upon the verdict was rendered, and the defendant appealed.

Each and all of the exceptions, with the exception of the one to the overruling of the motion for nonsuit, was abandoned by the counsel of the defendant in this court. The plaintiff contends that the court properly overruled the motion for nonsuit, for the reason that the defendant did not make the motion at the proper time,—that is, when the plaintiff had concluded his evidence,—and that when it was made it was after the defendant had introduced its evidence on the execution of the lease, which was not permissible, a defendant not being allowed to move to dismiss upon testimony introduced by himself. The contention is based on the provision of Acts 1897, c. 109, as amended by Acts 1899, c. 131. The amendment of 1899 has been repealed by the subsequent amendment of 1901 (chapter 594), which latter amendment is substituted for the former one, but for the purposes of this discussion that



is immaterial. The purpose of the motion was, not to procure a ruling by the court upon the right of the defendant to lease its road to the Southern Railway Company, for that had been admitted in the answer, but to have a ruling that the whole evidence showed that the plaintiff was injured while in the service of the lessee, and that it was not legally sufficient to establish the plaintiff's claim as against the defendant. If the defendant had proceeded under the statutory provisions above referred to, there could be no doubt that the question would have been properly raised. But was the defendant confined to the procedure marked out in those statutes? The motion was substantially "a demurrer to the evidence," and that practice is recognized in many of the states, and always has been with us. The purpose of the practice is to present to the court, instead of submitting the evidence to the jury, such facts as were shown, and as the evidence tended to prove, for the judgment of the court as to their sufficiency in law to establish the plaintiff's claim against the defendant. If the burden to make out the case is on the defendant, the plaintiff might demur to the evidence. The usual practice in this state before the enactment of the statutes above referred to was to proceed as is now provided for, except that now it is discretionary with the defendant whether he will introduce evidence after the motion to dismiss or not, while before these acts that matter was discretionary with the court. But what can be the objection to moving, for the first time, when all the evidence is in, notwithstanding Acts 1897, c. 109, as the proper method of demurring to the evidence? Of course, the evidence of the demurrant could not be considered. In the case before us there was no evidence offered by the demurrant, except on the matter of contributory negligence of the plaintiff. The fact that the Southern Railway Company was operating the train was admitted in the answer, and exemption pleaded on that account for the defendant. We will consider the motion as a demurrer to the evidence, though not very clearly expressed, and only made at the conclusion of all the evidence, the demurrant's evidence not bearing on the matter embraced in the motion. But his honor was correct in his refusing to sustain the demurrer. We will not attempt to add anything further to what has been said by this court on the responsibility of railroad companies who are lessors for the negligent acts of their lessees. They are both liable. In *Logan v. Railroad Co.*, 116 N. C. 940, 21 S. E. 959, the matter was thoroughly discussed and decided, and the opinion has been affirmed in numerous cases since. *Tillett v. Railroad Co.*, 118 N. C. 1031, 24 S. E. 111; *Benton v. Railroad Co.*, 122 N. C. 1007, 30 S. E. 333; *Perry v. Railroad Co.*, 128 N. C. 471, 39 S. E. 27; *Harden v. Railroad Co.*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747.

No error.

COOK, J. (dissenting). I do not concur in that part of the

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opinion of the court which holds that the defendant lessor company is responsible for the torts committed by its lessee, the Southern Railway Company. Under the powers conferred upon defendant company in its charter it had the right to lease, and in exercising the same did lease, its railroad and all its property, rights, and franchises (except the franchises to be and exist as a corporation), to the Southern Railway Company; and the latter, the Southern Railway Company, was, as such lessee, operating the same on its own account, and was the employer of the plaintiff at the time when the alleged injury occurred; and there was no contractual relation existing between the plaintiff and defendant. In no jurisdiction (except our own) is it held that the lessor company is liable for the contracts or torts of the lessee company, except—First, when the lease is made without legal license or authority (in which case the lessee is deemed to be the agent of the lessor); second, when the license or authority to lease is coupled with an express provision that the lessor shall be and remain liable for the acts of its lessee. In the case at bar the lease was made under express authority granted in the charter of the lessor company, and there is no provision that it shall be liable for the contracts or torts of its lessee. This doctrine was first held by this court in *Logan v. Railroad Co.*, 116 N. C. 940, 21 S. E. 959, and was approved in a number of cases thereafter. But when it was again presented to this court for review (for the first time after I became a member of this court) in *Harden v. Railroad Co.*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747, and after a thorough study of the principle involved and examination of the decisions bearing upon the question, I became satisfied that it was unsound in law, and there gave a full expression of my views in my dissenting opinion, to which I now refer without a rediscussion of the subject.

*HOWE v. NORTHERN PAC. RY. CO. et al.*

(*Supreme Court of Washington, Dec. 30, 1902.*)

[70 Pac. Rep. 1100.]

**Injury to Fireman—Parties.**

In an action by a fireman for injuries sustained in a collision it was proper to join with the railroad as parties defendant the division superintendent and division train dispatcher.

**Removal of Cause.**

Where, in an action against a nonresident railroad and two of its resident employees, the resident defendants were dismissed on their own motion, in opposition to plaintiff's contention, at the close of all the testimony, it was not error to refuse to remove the case to the federal court on the motion of the remaining defendant.

**Injury to Passenger—Collision—Presumption of Negligence.\***

A collision of trains is prima facie the result of negligence, where the rights of passengers and of railroad companies are in controversy.

\*See foot-note appended to *Texas & P. Ry. Co. v. Gardner* (C. C. A.), 3 R. R. R. 759, 26 Am. & Eng. R. Cas., N. S., 759.

*Howe v. Northern Pac. Ry. Co***Fellow Servants.**

A fireman who was injured by a collision of two trains cannot be held a fellow servant of both or either conductors.

**Same.**

Negligence of a fellow servant concurring with the negligence of the master does not excuse the primary negligence of the master for injury to another fellow servant.

Appeal from superior court, Spokane county; W. E. Richardson, Judge.

Action by Elzie N. Howe against the Northern Pacific Railway Company and others. From a judgment against the company, it appeals. Affirmed.

Stephens & Bunn, for appellant.

Barnes & Latimer and Hyde, Townsend & Thompkins, for respondent.

DUNBAR, J. This is a personal injury case. On the 2d of January, 1899, the respondent was fireman on train No. 13, a mixed passenger and freight train running from Cheney to Coulee City. On this day a snowplow train had been sent ahead of the passenger train to clear the road and prepare the track for the passenger train, and at a point about six miles west of Almira, a station between Cheney and Coulee City, No. 13, upon which respondent was firing the lead engine, ran into the snowplow, and respondent was injured by the collision to such an extent that his leg had to be amputated. Suit for \$25,000 damages on account of his injuries was brought by the respondent against the Northern Pacific Railway Company, which was operating the trains above spoken of. Respondent joined as defendants with the railway company Frederick W. Gilbert, who was at the time the superintendent of the division of the railroad upon which plaintiff was working, and A. G. Kamm, who was the chief dispatcher employed by the railroad of the division before mentioned. The trial of the cause resulted in a verdict for respondent for \$15,000 against the railway company alone, Kamm and Gilbert having been dismissed from the case by the court at the end of all the testimony. Judgment was entered upon the verdict, and from such judgment this appeal was taken.

The statement of the case by the appellant is very extensive and minute in detail, but we think we have stated sufficient to settle the propositions necessary for the determination of the cause. The complaint alleged negligence in the company in failure to promulgate and enforce ample and sufficient rules for the running of the trains; failure to provide proper machinery and appliances; in running defective locomotives and engines; that the same were unskillfully equipped, manned, and fitted out; failure to furnish competent servants; an insufficient number of servants; negligently ordering train No. 13 to proceed westerly from Almira station to Coulee City on the night in question; and various

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other allegations of negligence and failure on the part of Gilbert and Kamm to prepare, publish, and enforce all necessary rules, regulations, and orders for the running and operation of their trains. A joint demurrer of the defendants was interposed to the complaint on the ground of misjoinder, which was overruled, and on this ruling is based one of the assignments of error. It is contended by the appellant that there is no joint liability between the railway company and the dispatcher and the division superintendent; that the master cannot be liable together with any of its employees joined in an action based upon charges of this character; and it is insisted that this court has decided this question in favor of appellant's contention in *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649. But we do not so understand the decision in that case. There the action, brought against the railroad company and Root, was based exclusively upon the alleged negligence of Root while acting as conductor of one of the railroad company's freight trains, the respondent in that case being fireman and Root conductor on the same train. The jury returned a verdict finding for the plaintiff and against the defendant railroad company, and assessed the damages of the plaintiff at \$15,000. After the verdict was read, and before the jury was discharged, the attorney for defendant Root inquired of the court what construction the court would place upon the verdict with respect to defendant Root, and the court ruled that said verdict was, and should be considered as, a verdict in favor of defendant Root. The verdict was then recorded, and the jury discharged. Afterwards a judgment was entered in favor of Root and against the plaintiff for costs, and judgment was finally entered against the railroad company for the amount of the verdict, with costs to the respondent. This court held in that case that, inasmuch as the negligence of the railroad company was alleged to be the negligent action of the servant, and the jury having affirmatively found that the servant was not negligent, it must follow that there was no negligence on the part of the master, the railroad company; and that, as there had been no appeal from the judgment in favor of the servant, the cause could not be retried, and it was, therefore, ordered dismissed. In so far as the decision in this case and the discussion leading up to it are concerned, the particular question involved here was not involved in that case, nor attempted to be decided. If, however, any inference is to be drawn from the decision in that case, it is opposed to appellant's contention, for at the threshold of the case the question of nonjoinder was raised and vigorously discussed in appellant's brief, and, if the court had concluded that the appellant's contention was right on that jurisdictional question, it would not have been necessary to have examined or decided the subsequent point upon which the court's decision was based. On this question, however, there is a square conflict of authority,

and we have examined it with reference not only to the cases which are cited in appellant's brief, but with reference to the cases cited in the brief of the appellants in the case of *Doremus v. Root*, supra. Section 242 of *Shearman & Redfield on the Law of Negligence* (5th Ed.) is cited to support the contention that the master and servant cannot be joined. This and the succeeding section are in reality a discussion of the principle involved in the distinction that has been raised by some courts between the liability of an agent in case of nonfeasance and that of one in case of misfeasance; but in section 248 the rule is thus stated under the title "Joint Liability of Master and Servant": "Wherever a master can be held responsible for the tortious negligence of his servant, the two are generally held jointly as well as severally liable; and if a servant employs a subagent under such circumstances that both the original master and the intermediate employer are liable for the negligence of the subagent, they are all jointly and severally liable,"—citing several cases, but stating that a different rule prevails in Massachusetts, and probably in Maine. The theory of the cases holding that there cannot be a joint liability is that there is really but one act of negligence; that the negligence can be imputed to the master, not by reason of his being a joint tortfeasor, but by reason of his peculiar relation to his agent; and that public policy holds him responsible for the agent's acts under the doctrine of *respondeat superior*; and it seems that theoretically there may be something in this idea. Many of the cases, however, base their opinions upon the old distinction which we have spoken of between a case of misfeasance and one of nonfeasance, a distinction which this court in *Lough v. John Davis & Co.*, 70 Pac. 491, held not to be sound, either on reason or on authority. Without specially reviewing the cases on this subject, which are collated in *Warax v. Railroad Co.* (C. C.) 72 Fed. 637, in which the right to join the master and servant is denied, there are cited, as sustaining the affirmative of the proposition: *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507; *Suydam v. Moore*, 8 Barb. 358; *Montfort v. Hughes*, 3 E. D. Smith, 591; *Phelps v. Wait*, 30 N. Y. 78; *Wright v. Compton*, 53 Ind. 337; *Greenberg v. Lumber Co.* (Wis.) 63 N. W. 93, 28 L. R. A. 439, 48 Am. St. Rep. 911; *Newman v. Fowler*, 37 N. J. Law, 89. In support of the view that the master cannot be joined as defendant in an action against his servant for negligence, where the master is not personally concerned in the negligence either by his presence or express direction, the following are cited: *Parsons v. Winchell*, 5 Cush. 592, 52 Am. Dec. 745; *Mulchey v. Society*, 125 Mass. 487; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Seelen v. Ryan*, 2 Cin. R. 158; *Campbell v. Sugar Co.*, 62 Me. 553, 16 Am. Rep. 503; *Beuttel v. Railroad Co.* (C. C.) 26 Fed. 50; *Page v. Parker*, 40 N. H. 47; *Bailey v. Bussing*, 37 Conn. 349. Other cases have been decided since with



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equally conflicting results. But without entering into a discussion or an analysis of these conflicting opinions, considering the fact that universal authority will hold responsible in independent actions both the master and the agent or servant whose tortious act is the cause of the injury, and the holding of this court that as to the liability of the servant or agent there is no distinction between cases of misfeasance and those of nonfeasance, and in further consideration of the reformed procedure which obtains in this state, we are inclined to hold with those cases which permit the rights of all parties to be determined in one action, thereby discountenancing and rendering unnecessary a multiplicity of suits, rather than to compel the plaintiff to pursue and exhaust his remedy against one actor, and then, if compensation cannot be realized for the damage sustained, to proceed against another. We think this view is more in harmony with the spirit of our Code and modern procedure generally. It is therefore held that no error was committed by the court in overruling the defendant's demurrer to the complaint.

The next pertinent claim is that the cause should have been removed to the federal court upon the application which was made and the bond which was offered when Kamm and Gilbert were dismissed from the case. We do not think this contention can be sustained. It is true, under the authorities, if the application is made seasonably, it should be granted, even though it was not made at the commencement of the trial, as was decided in *Powers v. Railroad Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, cited by appellant. In that case, however, the plaintiff discontinued as to the resident defendants when the cause was called for trial; but in the case at bar it was the request of the defendants themselves that brought about their dismissal, in opposition to respondent's contention. This question is distinctly settled in *Whitcomb v. Smithson*, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303, a late case, decided in January, 1900, and one which seems to us to be exactly in point. In answer to the proposition urged here, the court in that case said: "This might have been so if, when the cause was called for trial in the state court, plaintiff had discontinued his action against the railway company, and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all the defendants;" citing *Powers v. Railroad Co.*, *supra*. "But," said the court, "that is not this case. The joint liability was insisted on here to the close of the trial, and the nonliability of the railway company was ruled in invitum. \* \* \* The case was prosecuted by plaintiff accordingly, and at the close of the evidence a motion was made to instruct the jury to return a verdict in behalf of the railway company because the evidence did not sustain the allegations of the complaint as to the negligence of that defendant, and the court granted the motion on that ground

in view of the rules of the company, which it found 'to amply cover all the contingencies arising in the prosecution of the various duties incident to railroad service at the point.' This was a ruling on the merits, and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable, and thereby to enable the other defendants to prevent plaintiff from taking a verdict against them. The right to remove was not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried." We think this case is decisive of the question raised, and that no error was committed by the court in refusing to transfer the case to the federal court.

We have examined the record in detail, and, although it is voluminous, we have been unable to discover any reversible error, either in the admission or rejection of testimony or in the giving or refusing to give instructions. But even if slight error had crept into some of the proceedings in relation to the proof of negligence, we think, under the theory of the appellant, that it would not have been prejudicial, and that the court would have been justified in instructing the jury that negligence had been proven. It is settled law that a rear end or head end collision is *prima facie* the result of negligence, where the rights of passengers and of railroad companies are in controversy. If any different rule obtains in a litigation between the railroad company and an employee who is injured, it must be upon the theory that the employee is in some way responsible for the negligence, either through contribution on his part or contribution by a fellow servant. It is conceded and asserted in this case that the conductors on both the trains, viz., the passenger train No. 13 and the snowplow train, were guilty of negligence, and that the accident would not have happened had it not been for such negligence. After discussing the rules which provide the duty incumbent upon the conductor to use certain precautions in cases of this kind, and referring to the fact that train No. 13 left Almira only 10 minutes after the snowplow train, and the assertion that the officers are charged by the rules with the duty of assuming that another train is coming when their train is delayed; that explosive caps or torpedoes are provided for placing upon the tops of the rails as signals to be used in addition to the regular signals; and many other precautionary provisions,—the appellant says: "It is shown by the record that trains very often lose time or actually have to stop between stations. This has been true ever since railroad trains commenced running, and because of this all trains were equipped, as this snowplow train was equipped, with appliances to protect them ahead and in the rear. These appliances are so effective and so easily used that there is no occasion and no reason for a rear-end collision of this sort,

except in the instance where the train crews are wholly negligent and careless in the use of the signals, or in the entire failure to use them. It will be noted that there was no careless or negligent use of the signal appliances which were on this snowplow train. They had the appliances, they had torpedoes, they had fuses, and they had lanterns; but, instead of there being a negligent or careless use of them, they did not use them at all. Any one of these signals would have avoided a collision or accident of this sort. A torpedo placed on the track, even though there be but one, is a signal for any following train to stop until it has burned out. \* \* \*

There was a conductor on the train, who could have done these things; there was a rear brakeman on the train, who could have done these things; and every single one of these men knew and must have known that train was losing time from the moment that it left Almira; and every one of these men knew and must have known that a fast running passenger train was behind them, running in the same direction. It is almost inconceivable under such circumstances, and almost impossible to believe, that these appliances for their protection were not used; but they were not, and thus the injury was caused." Like negligence is attributed by the appellant to the managers of both the snowplow train and the passenger train. This charge must be made upon the theory that the fireman was a fellow servant with the conductor of the train, and that, therefore, the negligence of the conductor was the negligence of the fireman. We cannot conceive that it is the duty of the fireman to assume or know that the conductor has not done his duty,—a duty so plain and palpable as is charged upon him by the appellant in this case; or that he is to leave his box, and establish a surveillance over the conductor and other operators of the train. Such conduct on his part would not only be unbecoming or intolerable, but, if tolerated, might lead to the gravest results. There must be some one in control of trains of cars while in transit. There must be some directing mind, some particular person in whom responsibility is lodged; and it would lead to most disastrous confusion if the practice obtained to confer responsibility and directing power equally and miscellaneously upon conductors, brakemen, engineers, firemen, and other operators of a railroad. The proof of such a practice would be the strongest proof of negligence. But it may be confidently asserted that no such practice prevails. It is matter of common knowledge that the conductor of a train under ordinary circumstances is the controlling power. His official title indicates it; and the assumption of the master's authority by him, together with the actions of the company towards him, proves it. As was pertinently said by the supreme court of the United States in *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787: "The conductor of a railway train, who commands its movements, directs when it shall start, at what stations it

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shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company; and therefore that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, the train is operated without any representative of its owner." But, whatever may be said of the doctrine of fellow servants in other jurisdictions, under the uniform holdings and announcements of this court the fireman on this train cannot be held to be a fellow servant of the conductors on both or either of the trains which collided, and the negligence which led to this collision is proven upon both equally. The negligence of the company was so overwhelmingly proven in many instances in this case that, even if there had been negligence on the part of some one who might be construed to be a fellow servant of the respondent, the appellant would not thereby be relieved of its responsibility. *Railroad Co. v. O'Brien*, 1 Wash. St. 599, 21 Pac. 32. It is uniform authority that, if negligence of the master contributes to the injury, he is liable, even though the negligence of a fellow servant was contributory. *Railroad Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266. This principle had been uniformly followed by this court, and was again announced in *Ralph v. Bridge Co.* (decided December 23, 1902) 70 Pac. 1098, where it is said: "It is also well settled that, if the negligence of a fellow servant concur with the negligence of the master, it does not excuse the primary negligence of the master for injury to another fellow servant."

An investigation of the whole case convinces us that no substantial error was committed in any respect. The judgment is therefore affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur. MOUNT, J., being disqualified, did not take part in this decision.

## ALABAMA G. S. R. CO. v. HAMILTON.

(*Supreme Court of Alabama, Dec. 18, 1902.*)

[33 So. Rep. 157.]

## Accident on Track—Wantonness or Wilfulness—Sufficiency of Evidence.

In an action against a railroad for negligent death, it appeared that defendant's engineer discovered plaintiff's intestate while the train was 200 yards distant from deceased, and noticed that he was sitting on the outside of, but leaning over, the rail, and that his head was nodding as if he were asleep. The train could have been stopped within 125 yards, but the engineer made no effort to do so, though he sounded the whistle: *held* to justify submission to the jury of the issue as to whether defendant was guilty of willful or wanton negligence.

## Same—Knowledge of Deceased's Peril.\*

Where the evidence in an action against a railroad company showed

\*As to the duties of trainmen after discovering person in perilous situation upon the track, see note appended to *Cottrell v. Southern Ry. Co.* (Miss.), 2 R. R. R. 641, 25 Am. & Eng. R. Cas., N. S., 641.

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that defendant's engineer saw deceased leaning over the rail asleep, and frequent blasts of the whistle failed to arouse him, charges that there was no evidence that the engineer knew that deceased was unable to leave his perilous situation were properly refused.

**New Trial.**

Judgment of the trial court in denying a new trial is presumed correct, and will be reversed only where clearly erroneous.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

Action by Fred D. Hamilton, as administrator of Alfred Wicks, deceased, against the Alabama Great Southern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action by Fred D. Hamilton, as administrator of the estate of Alfred Wicks, deceased, to recover damages for the alleged wanton or intentional killing of plaintiff's intestate. The trial was had on the plea of the general issue. The evidence showed that Wicks was killed by appellant's passenger train at a point on defendant's track distant from one-quarter to three-quarters of a mile from Powderly. The train was about 10 minutes late, and was running at a rate of speed estimated by plaintiff's witnesses at from 25 to 45 miles an hour, and by defendant's witnesses at from 55 to 60 miles an hour. The witnesses disagreed in their statements as to where the engine was when the alarm signals were first sounded, but they were sounded continuously from the time they began until Wicks was struck. The injury occurred on a bright day, about noon, and the track was up grade from Powderly to the scene of the accident. The evidence of two of plaintiff's witnesses was to the effect that the train was blowing a succession of short blasts from Powderly to the place of the accident, a distance of about a quarter of a mile; that it did not stop or slacken its speed until after Wicks was hit, but ran past where he was before stopping,—one witness saying that it ran 150 yards before it stopped, after striking Wicks. One of said witnesses (Mims) testified that he was in Powderly when the train passed, and from his position there he saw Wicks on the track, or by the side of the track; that he was either lying down, or was propped up, "mighty near down," on the engineer's side of the track; that a person sitting on the engine could have seen Wicks from where witness was in Powderly. One Ross, a witness for plaintiff, testified that he had 10 years' experience as an engineer and fireman, and that a passenger train such as caused the injury complained of, running at a rate of speed of 25 to 40 miles an hour on a steep up grade, could be stopped in 125 yards, and, if running on a level, could be stopped in 150 or 200 yards. The railroad track was laid on an embankment from Powderly to where the injury occurred. Another witness for plaintiff testified that he went to the spot where Wicks was killed, and saw blood on the track there; that he saw Wicks after he was



killed; and that he was struck on the right side of his head. The engineer of the train, testifying for the defendant, stated that when he first saw Wicks he was about 75 or 100 yards from the engine; that he was sitting on the end of a cross-tie, or between the ties, in a stooping-over position, like he was nodding, and witness could see his head move backwards and forwards; that as soon as he saw Wicks he put on the brakes in emergency, and blew the alarm whistle, reversed the engine, and put on sand; that the effect on the train was to stop it in 150 or 200 yards after striking Wicks, and this was an unusually good stop; that he was looking ahead, and the train was properly equipped, and the appliances in good working order. The fireman testified that he saw Wicks on the track; that he appeared to be sitting on the end of a cross-tie, with his head hanging over the rail; and that, so far as he could see, he did not move from the time he saw him until he was struck. Other evidence for defendant tended to show that after going about 100 yards from Powderly the engineer began blowing the whistle; that, after the air brakes were applied, the train ran from 60 to 80 feet before Wicks was struck. Defendant requested the following written charges, to the refusal of which separate exceptions were reserved, namely: "(1) I charge you, if you believe the evidence, you should find a verdict for the defendant. (2) I charge you that, if you believe the evidence, you must find that the engineer was not guilty of any willful or wanton negligence." "(7) I charge you that there is no evidence in this case that Wicks was unable, from physical or other disability, to leave the position of peril occupied by him, and thus escape injury. (8) I charge you that there is no evidence that the engineer knew or had reason to believe that Wicks was unable to leave the position of peril occupied by him, in time to have stopped the train and avoided the injury. (9) I charge you that there is no evidence that the engineer knew that Wicks was unable to leave his position of peril. (10) I charge you that there is no evidence that the engineer had reasonable cause to believe that Wicks was unable to leave his position of peril and escape injury." A verdict having been rendered for plaintiff, a motion for a new trial was made, based upon the refusal of the above charges, and upon the ground that the verdict was contrary to, and unsupported by, the evidence. This motion was overruled, and defendant appeals.

A. G. & E. D. Smith and John London, for appellant.

Bowman, Harsh & Beddow, for respondent.

McCLELLAN, C. J. There was evidence adduced on the trial upon which it was open to the jury to find that the train which ran against and killed Wicks, plaintiff's intestate, was running from 25 to 45 miles an hour when the engineer discovered him on the track; that a train such as that was, going at that rate of speed on an up grade such as existed at the place, could be stopped within 125 yards; that the engi-

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neer discovered Wicks when the engine was more than 200 yards from him; that he was then sitting on the end of a cross-tie, or between the ends of cross-ties, on the outside of, but leaning over, the rail; that he was asleep; that it was apparent to the engineer when he first saw him that he was asleep, the engineer himself testifying that Wicks was sitting "in a stooping-over position, like he was nodding, and witness could see his head move kind of backwards and forwards"; that he was not awakened by the approach of the train or the alarms which the engineer sounded, but continued asleep, and was struck and killed while he was asleep; that the engineer made no effort to stop the train when he saw Wicks asleep on the track, nor, indeed, until he had been struck and killed; and that the train was not stopped until it had gone 200 yards beyond Wicks' body. We cannot hesitate to declare that these tendencies of the evidence afforded ground for a conclusion on the part of the jury that the engineer recklessly and wantonly, and with marked indifference to probable disastrous consequences, took the unnecessary chances of Wicks' awakening and extricating himself from his position of imminent and deadly peril, or of remaining asleep and going to his death as he did, and that, having so gone to his death, he was wantonly killed by the defendant, as charged in the third count of the complaint. The trial court therefore properly refused the affirmative charge requested by the defendant, and also charge 2, to the effect that the engineer was "not guilty of any willful or wanton negligence."

A man who is so sound asleep that the noise and alarm of an immediately approaching train does not awaken him is unable to leave the position he may be in, and one who knows of such condition has probable cause to know, and, it may be inferred, does know, that he is unable to move. Charges 8, 9, and 10 were therefore properly refused.

Charge 7 requested by defendant was also bad. Profound slumber is a "physical or other disability to leave the position" occupied by the sleeper.

Having in mind the settled rule which wisely accords to the judgment of the trial judge denying a motion for a new trial the prima facie presumption of correctness, and authorizing a reversal of that judgment here only when it is plainly erroneous, we cannot see our way to reversing the ruling on the motion for a new trial in this case. Affirmed.

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*KELLEY v. CHICAGO, B. & Q. R. Co.*

*(Supreme Court of Iowa, Oct. 29, 1902.)*

[92 N. W. Rep. 45.]

**Appeal—Review.**

Where, on appeal from a judgment for plaintiff, the question is whether there was evidence to support the verdict, and the evidence is conflicting, that view of it most favorable to plaintiff must be taken.

Kelley v. Chicago, B. &amp; Q. R. Co

**Injury to Employee—Failure to Stop Train after Discovering Plaintiff's Peril.\***

Plaintiff, a section hand, wearing a cap pulled down over his ears, was driving a rail spike, and a freight train causing considerable noise was passing him on a track parallel to that on which he was at work, when a train approached from the direction to which his back was turned. When within 200 feet of him, the whistle was blown to warn him, but no steps were taken to check the speed of the train, and when within 50 feet of him the fireman called to him, without success. It was then impracticable to give further warning or stop the train, and plaintiff was run over: *held*, in an action for the injuries, that defendant was negligent in not having taken proper steps to stop the train in case plaintiff did not hear the warnings.

Appeal from district court, Fremont county; A. B. Thornell, Judge.

Action for personal injuries. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

Stone & Tinley, for appellant.

W. E. Mitchell, for appellee.

McCLAIN, J. The accident resulting in the injury for which plaintiff seeks to recover occurred at Hastings, in this state, and was occasioned by the engine of a freight train, which ran against the plaintiff, who was on or near the track in front of the engine. The plaintiff was in the employ of defendant as a section hand, and on the morning of February 28, 1900, by the direction of the section foreman, he started east from the depot at Hastings, with a spike maul and some spikes, for the purpose of going along the track in order to make such repairs thereon as he might find to be necessary. The morning was cold, and he wore a woolen cap pulled down over his ears. The train which ran into him was coming from the east, and at the time it struck him, another freight train, headed east, was slowly running along the passing track parallel to the main track on which plaintiff was struck. As to these facts there is no controversy, but with reference to the exact circumstances of the accident there is great conflict in the evidence. It may properly be said that there was some evidence that plaintiff was walking east, with his maul on his shoulder, facing the approaching train, and that he appeared to step aside with the intention of avoiding it, but was nevertheless struck, as is suggested, by reason of lack of judgment on his part in not stepping far enough away from the track to avoid the engine. But as the principal question before us is whether there is any evidence under the rules of law laid down for the direction of the jury to support the verdict, we must take the view of the evidence most favorable to the plaintiff, including his own testimony as to what occurred; for, while counsel for appellant contend that in very material

\*As to railroad's liability for injury occasioned by negligence after becoming aware of party's peril, notwithstanding his contributory negligence, see foot-note appended to Shannon v. Boston & M. R. R. (N. H.), 4 R. R. R. 192, 27 Am. & Eng. R. Cas., N. S., 192.

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matters the plaintiff was uncorroborated, and that his testimony is wholly overthrown by that of the witnesses for defendant, we have to say that there is such conflict in the testimony of defendant's witnesses, as compared with each other, that we are not justified in disregarding the account which plaintiff gives of how the accident occurred. We find, then, that there is evidence to show that plaintiff, having proceeded some little distance eastward from the depot along the main track, found a loose spike, and stopped to drive another in its place; that at the time he did so he had no reason to apprehend the approach of a train from one direction rather than another, inasmuch as the freight train which was the occasion of the injury was much behind schedule time, and he had no information as to when it would arrive; that in driving the spike he stood with his back to the east, and, as above suggested, with his cap drawn over his ears; that while he was in this position, and engaged in driving the spike, the train in question came from the east, the engineer and fireman both observing him to be upon the track; that the train was running at the rate of about 8 miles per hour; that when within about 200 feet of plaintiff the alarm whistle was blown, but no steps were taken to check the speed of the train; that the rails were frosty, so that it was more difficult to control the speed of the train than it otherwise would have been; that the train could have been stopped within the distance of about 150 feet; that when the train was within about 50 feet of plaintiff the fireman called loudly to him, to warn him of danger, but without success; and that after that time it was impracticable to give any further warning than that which had been given, or to stop the train before reaching the plaintiff. The court directed the jury that under the evidence the plaintiff was guilty of contributory negligence, but left it to the jury to say whether, "after the danger the plaintiff was in, and that he would not get off and away from the railroad track in time to avoid injury, was known to the employees of the defendant in charge of train No. 85, or ought to have been known to them in the exercise of reasonable judgment and care on their part, they might, by the exercise of reasonable diligence on their part in giving signals to warn plaintiff of his danger, or by using the appliances at their command to stop the train, have avoided the injury to plaintiff, and that, but for their negligence in this respect, the injury to plaintiff would not have happened to him." The jury found, in answer to a special interrogatory, that the defendant's employees were negligent in failing to use the appliances at their command to slow up and stop the train, and exonerated them from any negligence in failing to give the plaintiff warning. The question is, then, whether there is any evidence in support of this finding of negligence.

The theory of appellant's counsel is that, in the first place, there was no negligence on the part of defendant's employees,

because they had reason to suppose that the plaintiff would not be negligent, and would leave the track before the train reached him; and that, after it became apparent that he would not do so, it was too late to stop the train; and, further, that plaintiff's negligence in not looking out for and avoiding the train was continually existing up to the very moment of the accident, and, even if defendant's employees were negligent, their negligence simply concurred with that of the plaintiff, and would not furnish a basis for recovery. Conceding plaintiff's negligence, and inquiring as to whether the employees of defendant exercised reasonable care in attempting to avoid injuring plaintiff, after the danger due to his own negligence became apparent to them, the question is how soon the duty devolved upon them to take steps to avoid injury to plaintiff, and what steps were required of them in the reasonable effort to avoid such injury. Without elaboration, we think that it may safely be said that when the defendant's employees in control of the train saw that, if plaintiff did not leave the track, he would be injured, and long enough before reaching plaintiff so that the train could be stopped before reaching him if he did not appear to give heed to the warning, it was their duty to give suitable signals for the purpose of attracting his attention and advising him of his danger. This, it appears, they did; but we think that it was their further duty, if plaintiff gave no indication that he was advised by these signals of his danger, and they had any reason to believe that he was not warned, to take steps to stop the train before it should reach him. There was evidence tending to show that it was within the knowledge of the engineer and fireman of the approaching train that plaintiff was standing with his back toward them, with his cap pulled over his ears, and engaged in driving a spike, and that a freight train, causing considerable noise by reason of the puffing of the engine and the rattling of the cars, was running on a track only a few feet from where plaintiff was standing. This was sufficient, in our judgment, to require of the engineer and fireman that they take steps by slowing the train, and by stopping it, if necessary, to avoid injury to plaintiff in case he did not hear, or, hearing, did not heed, the warning given to him. We do not say that, if he had heard the warning, and persisted in remaining on the track, he could have recovered in the event that the train was not stopped before reaching him, but the evidence tends to show that he did not hear such warning. His negligence in not taking notice of the approaching train was, therefore, complete when it was near enough to him so that the employees in charge must commence to stop the train in order to avoid striking him, if he should not leave the track. We are not unmindful of the fact that this view may impose some irksome and annoying inconvenience on those engaged in operating trains. No doubt some persons, through mere fool hardiness or bravado, may, with knowledge of the



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approach of a train, remain on the track until it is so near that it would be impossible to stop it without an accident before reaching them, and then step out of the way; but, in view of the evidence that the plaintiff did not hear the approaching train, and had no immediate intention, therefore, of removing himself from the track, we think the defendant must be held liable for negligence of the employees in charge of the train in not taking steps to avoid running against the plaintiff. The danger that the operating of trains may be inconveniently interfered with by this rule is not sufficient to justify the assumption of the danger involved in putting a person who is on the track in danger of his life, should he, for any reason,—even his own negligence,—fail to notice the signal of danger.

Several of the cases relied on by appellant are those where the employees in charge of trains have had no reasonable ground to anticipate an accident unless the party who is subsequently injured should do some further act which would bring him into danger. Thus, where one apparently about to cross a railroad track turned, and walked along the track, instead of crossing it, the employees in charge of an approaching train were held not to be guilty of negligence, if the injured party would not have met with the accident had he proceeded across the track in accordance with his apparent intention. *Schmolze v. Railway Co.*, 83 Wis. 659, 53 N. W. 743, 54 N. W. 106. The cases of *O'Donnell v. Railroad Co.*, 8 Cent. Law J. 414, and *Valin v. Railroad Co.*, 82 Wis. 1, 51 N. W. 1084, 33 Am. St. Rep. 17, referred to in the case last cited, are of the same character. Other cases which counsel cite, such as *Davis v. Railroad*, 70 N. H. 519, 49 Atl. 108; *O'Brien v. McGlinchy*, 68 Me. 552; *Kirtley v. Railroad Co. (C. C.)* 65 Fed. 386; *Railroad Co. v. Moseley*, 6 C. C. A. 641, 57 Fed. 921,—are like that of *Keefe v. Railway Co.*, 92 Iowa, 182, 60 N. W. 503, 54 Am. St. Rep. 542, in which it was held that the duty on the part of the railroad employees to use due care in view of the contributory negligence of one in danger only arises when such contributory negligence placing the person in danger becomes known to such employees. What is said in these two classes of cases with reference to concurrent or mutual negligence is not said, therefore, with reference to such a state of facts as is now before us. If, after the person in danger is aware of his danger, he continues negligent in not avoiding it, then his negligence, and not any negligence of the employees, is the proximate cause of the injury; but here, the danger of the person on the track being obvious to the employees, and there being reasonable ground for them to believe that such person was not aware of his danger, it was then their duty to look out for him, and failure to do so was negligence. *Orr v. Railway Co.*, 94 Iowa, 423, 62 N. W. 851; *Masser v. Railway Co.*, 68 Iowa, 606, 27 N. W. 776; *Moore v. Railroad*, 47 Iowa, 688; *Morris v. Railroad*

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Co., 45 Iowa, 29; Little *v.* Transit Co., 88 Wis. 402, 60 N. W. 705; Clark *v.* Railroad Co., 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749. If the employees had had reason to believe, in the exercise of due care, that plaintiff was aware of the danger, then the case would be different. Starbard *v.* Railway Co., 122 Mich. 23, 80 N. W. 878. But the question whether they had reason to believe that plaintiff knew of his danger was for the jury. As is said in O'Brien *v.* McGlinchy, 68 Me. 552: "It is impossible to establish rules under which all cases can be arranged, considering the variety of circumstances under which the question of negligence arises." Language used in the case of Sharp *v.* Railway Co., 161 Mo. 214, 61 S. W. 829, is also pertinent: "The facts and circumstances which bring a cause within this exception to the general rule that contributory negligence of the plaintiff or deceased precludes a recovery are as variant as the cases in which it has been invoked, and but little assistance can be derived from adjudicated cases, in which the facts are seldom analogous to the one in hand. To arrive at a correct conclusion in a given case, the only rational mode is to put ourselves in the place of the one charged with such conduct, and interpret his conduct in the light of all the facts and circumstances by which he was surrounded, and in view of which he acted." We are satisfied that under the facts in this case there was evidence sufficient to support the verdict of the jury.

Affirmed.

### ATCHISON, T. & S. F. Ry. Co. *v.* LOGAN *et ux*.

(*Supreme Court of Kansas, Dec. 6, 1902.*)

[70 Pac. Rep. 878.]

#### Death of Employee—Res Gestæ—Declarations of Injured Party.\*

A railway switchman, in attempting to uncouple two freight cars while they were in motion, fell between them, receiving injuries which resulted in death shortly thereafter. After he was removed from under the cars, he told the foreman in charge of the train to call some one; that he wanted to make a statement. The foreman signaled the engineer, who moved his engine toward the place where the switchman was lying, got down, and arrived at his side about five minutes after the accident. In response to a question as to what the switchman wanted, the latter narrated briefly how the accident happened: *held*, that the declarations were not a part of the res gestæ, and inadmissible.

#### Same—Same—Same—Self-Serving Declarations.\*

A spontaneous utterance, an ejaculation, an intuitive explanation of a hurt, generated by pain or excitement, are properly included within the res gestæ; but a statement made after apparent delay, showing calculation, and a reflective, thoughtful purpose to postpone the making of it until witnesses are present to attest the words spoken, removes the narrative into the category of a self-serving declaration, and renders it inadmissible in evidence.

(Syllabus by the Court.)

\*See generally, Williams *v.* Southern Pac. Co. (Cal.), 22 Am. & Eng. R. Cas., N. S., 442, and foot-note.

*Atchison, etc., Ry. Co. v. Logan et ux*

In banc. Error from district court, Leavenworth county; L. A. Myers, Judge.

Action by Patrick Logan and wife against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

A. A. Hurd and O. J. Wood, for plaintiff in error.

J. C. Petherbridge and John H. Atwood, for defendants in error.

SMITH, J. This was an action brought by Patrick and Eliza Logan, as parents and next of kin, to recover damages by reason of the death of their son, William T. Logan, who was killed by the cars of the Atchison, Topeka & Santa Fe Railway Company in the company's yards at Arkansas City. They had judgment in the court below. The deceased was a switchman. He went between a coal car and an oil-tank car to uncouple them while they were in motion. Standing on a brake beam, and while the cars were being pushed by a switch engine at a speed of about six miles per hour, one Cooper, foreman of the switching crew, without receiving any signal from Logan, motioned to the engineer to stop. This was done, and a few moments later it was discovered that Logan had been run over. Four or five minutes after the injury, Logan made a statement in the presence of Cooper and the engineer. He said that "he tried to raise the lever on this side, and he could not, and, when he went in between them to get to the one on the opposite side, he was jerked off." This testimony was offered on behalf of plaintiffs below, and received over the objection of the railway company. It was material. It is necessary to a proper understanding of the facts which led up to this statement of the deceased to set out the testimony of the witness Cooper, who detailed them. "Q. Then I understand you to say that, immediately after the train had passed over him, you and Mr. Dowhen pulled him out from under the cars? A. Yes, sir. Q. What did you do with him? A. Laid him on the ground near by. Q. Did the deceased, Logan, make any statement at that time as to how the injuries occurred? A. He did. Q. How soon after he received his injuries did he make this statement? A. About 4 or 5 minutes. Q. And where was it made? A. He was lying there on the ground at the time. Q. Was he in plain view of the car that had run over him? A. Yes, sir. Q. About how many feet away from the place where he was hurt? A. About two or three feet. Q. Who was present? A. No one but myself, at the time he said he wanted to make the statement. Q. Who was present at the time he made the statement? A. Engineer,—Mr. Edward German. Q. Did Mr. Logan die soon after the statement was made? A. Yes, sir. Q. How soon afterwards? A. I do not know the exact moment he died. About 30 minutes. Q. Now, you may state what he said relative to how he received the

injuries. A. He told me to call some one,—that he wanted to make a statement; and I backed Mr. German down over the switch with the string of cars, and gave him the signal to come ahead,—to get him up closer to me, so I could call him; and I called Mr. German, and he came down and asked Mr. Logan what it was he wanted; and Mr. Logan said 'he wanted to say that he tried to raise the lever on this side, and he could not, and when he went in between them, to get to the one on the opposite side, he was jerked off.' " The statement of Logan was received in evidence as a part of the *res gestæ*, and its admissibility is defended by counsel for defendant in error on that ground. Counsel on the other side contend that the statements of the injured person, made five minutes after the accident, were but the narrative of a past transaction, not accompanying the principal fact, and hence not receivable in evidence.

There is much conflict in the authorities respecting the admissibility of such declarations, but we are not called on by the circumstances of this case to decide the question on the objection made to the evidence by the railway company, as above stated. Here the account given by the deceased respecting the manner of his injury was preceded by much deliberation. When lying on the ground, with no other person than Mr. Cooper present, he said he desired to make a statement. He requested Cooper to call some one, and delayed making any communication until Mr. German, the engineer, backed his engine down over a switch, and then came forward near the place where he (Logan) was lying. On the approach of the engineer, the latter asked him what he had to say. His statement was then made in respect to this inquiry. The element of spontaneity is the controlling feature in the adjudged cases, holding declarations made immediately after an injury of this kind to be admissible. Lapse of time is important only as affecting the spontaneity of the words uttered. An ejaculation, an intuitive explanation of a hurt, generated by feelings of excitement, are properly included within the *res gestæ*; but a statement made after apparent deliberation, indicative of ruminating delay on the part of the narrator over the matter narrated, removes what is said into the category of self-serving declarations, which are inadmissible. In *Insurance Co. v. Sheppard*, 85 Ga. 751, 776, 12 S. E. 18, 27, it is said: "That they [the words spoken] shall be or appear to be spontaneous is indispensable, and it is for this reason alone that they are required to be speedy. There must be no fair opportunity for the will of the speaker to mold or modify them. His will must have become and remained dormant, so far as any deliberation in concocting matter for speech or selecting words is concerned. \* \* \* His declarations must be the utterance of human nature, of the genus *homo*, rather than of the individual. Only an oath can guaranty individual veracity. \* \* \* True, the verbal deliverance in

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such instance is that of an individual person. But if the state of his mind be such that his individuality is for the time being suppressed and silenced, so that he utters the voice of humanity rather than of himself, what he says is regarded in law as in some degree trustworthy." Logan said nothing about the manner of his injury to Cooper and Dowhen, who pulled him from under the cars. This may be explained, however, by considering the pain he was suffering at the time. Afterwards, when Cooper alone was present, he requested that another person be called to hear his statement. He was evidently at that time as physically able to say to Cooper what he afterwards said to Cooper and German. The desire that more than one person should hear his explanation of the cause of his injury, and holding it back until two were present, showed a calculating mind; a preliminary pondering over the subject; a reflective, thoughtful purpose to make testimony favorable to himself, postponed with method until the number of witnesses desired could attest his words. There was wholly lacking in the circumstances of the declaration that which showed an "utterance of human nature rather than the individual." See *Railway Co. v. Robertson*, 82 Tex. 657, 17 S. W. 1041; *McGowen v. McGowen*, 52 Tex. 657; *Pilkington v. Railway Co.*, 70 Tex. 226, 7 S. W. 805; *Kennedy v. Railroad Co.*, 130 N. Y. 654, 29 N. E. 141; *Underh. Ev.* § 57. The rule in this state relative to declarations forming part of the *res gestæ* is found in *State v. Montgomery*, 8 Kan. 351, and *Tennis v. Railway Co.*, 45 Kan. 503, 25 Pac. 876. The fact of Logan's death shortly after the statement was made cannot affect the competency of the testimony. It was not a dying declaration, because it was not shown that the deceased was apprehensive of impending death. Besides this, dying declarations, except as they are so declared by statute, are not admissible in civil actions. 2 *Tayl. Ev.* (Chamberlayne's Notes) p. 470; *State v. O'Shea*, 60 Kan. 772-777, 57 Pac. 970.

The judgment of the court below will be reversed, and a new trial ordered. All the justices concurring.

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O'NEILL v. CHICAGO, R. I. & P. R. Co.

(*Supreme Court of Nebraska, Dec. 3, 1902.*)

[92 N. W. Rep. 731.]

**Injury to Employee—Error in Judgment.\***

An employer is not liable in damages for the consequences of mere error in judgment in furnishing structures, machinery, and appliances for the use of his servants in the prosecution of his business, unless it is shown that such error is itself the result of negligent or willful ignorance or inattention.

(Syllabus by the Court.)

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\*As to the degree of care required in furnishing appliances, see foot-note appended to *Atchison, T. & S. F. Ry. Co. v. Kingscott* (Kan.), 4 R. R. R. 528, 27 Am. & Eng. R. Cas., N. S., 528.



O'Neill v. Chicago, etc., R. Co

On rehearing. Former judgment vacated, and judgment of district court affirmed.

M. F. Harrington, for plaintiff in error.

M. A. Low, W. F. Evans, L. W. Billingsley, R. J. Greene, J. M. Woolworth, W. D. McHugh, and Wm. V. Allen, for defendant in error.

AMES, C. This was submitted and decided at a former term of the court, and an opinion filed on the 19th day of June, 1901. See 62 Neb. 358, 86 N. W. 1098. Afterwards a motion for a rehearing was granted, and the cause has been exhaustively reargued by the counsel for both parties, and resubmitted for our consideration. The vital question in the case is one of extreme importance, not only to the parties thereto and to railroad companies, but to all persons making use of mechanical devices in the conduct of their business, and to their servants and employees, and to the public generally. We do not conceive that, in the absence of legislation, any different rule of liability or responsibility is applicable to railroad companies than to other persons under substantially similar circumstances. The plaintiff in error was injured in the service of the company by reason of having one of his feet caught under an unblocked guard rail while he was attempting to uncouple some cars belonging to one of the trains of the defendant. Other circumstances of the accident are set out in the former opinion, but are not required to be repeated here. The jury returned a verdict for the defendant in obedience to a peremptory instruction by the court. The charge of negligence by the company consists in its omission to block the rail. We are convinced that we fell into an error of fact in the statement in the former opinion that "it sufficiently appears from the evidence that, long prior to the injury complained of, most railway systems had adopted the precaution of blocking the space between the two rails with wood, thereby lessening the danger to the employees." A more thorough examination of the record, aided by a more complete analysis thereof by counsel than we were favored with on the former hearing, has disclosed that there were wide differences of opinion between railway companies and their skilled managers with respect to the relative safety to their servants and to the public of the blocked and unblocked guard rails; that a very large number—perhaps a majority—of the principal railway systems of the country continue the use of unblocked rails; and that in some instances the managers of the companies have used the blocked and unblocked, alternatively, because of an inability to satisfy their own minds which, upon the whole, is the safer and more prudent course to pursue. There is also some evidence that in the opinion of some managers the relative safety of the use of the device of blocking, and the contrary, is dependent upon the situation of the road to which it may be applied,

and to the character of the soil over which the road extends, and the liability of the spaces between the rails becoming filled up with drifting sand and dirt. But the plaintiff offered no evidence to prove what is the effect, if any, of the use of blocks upon the safety of the transportation of persons and property over the railways, or the facility of moving trains. Upon this state of the record, can it be properly said that a railroad company is negligent because of using or of failing to use the block? We think not. It is a case not analogous to the use of defective machinery, or of omitting the use of a device generally approved, and obviously adapted to prevent or lessen a known and specific danger. The rule of law is that in such cases the employer must exercise such care and skill as, under the circumstances, reasonable and ordinary prudence requires to be used. The phraseology by which the rule is variously stated is somewhat indeterminate, because the idea sought to be expressed is in like degree vague, and its application in any case depends in a great measure upon the attendant facts; but it may be said generally that a man cannot be held responsible in damages for the consequences of an error in judgment, carefully formed after an intelligent survey of all the elements entering into the problem which he is called upon to solve. Such a responsibility would transcend any which any accepted theory of ethics has ever demanded, and would exceed the ability of civil tribunals to enforce or even to expound. Mechanical devices, like medicinal remedies, are innumerable, and the only sure test of either is that of experience; and, until the latter has pronounced a definite judgment, one who, in the exercise of ordinary skill and care, makes use of that which, in his opinion, is most conducive to the accomplishment of a desired result, cannot be held responsible for the consequences. Extremes meet. Under the contrary rule, responsibility of each to all and of all to each, being theoretically universal, would practically cease to exist. Scientific progress would be arrested, and society would dissolve into its primary elements. Whatever may be the theological consequences of an "honest doubt," it cannot be sufficient ground for recovery in a civil action for damages. Civil tribunals have not the attribute of omniscience, without which an issue pertaining thereto cannot be tried, or an adequate judgment thereon pronounced. Servitude, in this age and country, is voluntary. The servant assumes the risk incident to the nature of his employment. Among these is the danger of error of judgment by his employer in the choice of tools and mechanisms with which his tasks are to be performed, and he cannot be held civilly liable in choosing one of two or more mechanisms regarded by those called on to use such devices, and competent to judge of their safety from long use and experience in their operations, as among the best in use, even though an accident may happen to an employee in the use of

the one selected, that could not have occurred in the same manner, had another kind been chosen. When experts skilled and experienced in their profession differ with respect to the choice of the means, remedies, or mechanisms best adapted or adaptable to the accomplishment of a given end, especially if that end be not simple and single, but is itself compounded of many elements, courts and juries are incompetent to decide between them. A world-old problem is expressed by the inquiry, "When doctors disagree, who shall decide?" In whatever field of inquiry, proof of the best is a requirement which it is impossible to meet. That of the comparative is often beyond reach. The highest scientific attainments vary in their conclusions, while varying degrees of practical skill often differ where the former agree. Judicial tribunals cannot supervise or correct the mistakes of either. They cannot so do, if for no other reason, because their decision in a particular instance decides nothing but the matter then being especially litigated. The decision furnishes no rule for the future guidance of the parties. The very act or omission which in one case has served as the occasion of punishment or exculpation may in the very next case, tried upon the same or following day, have an exactly opposite consequence. Such results would travesty the administration of justice, and so we think that the courts have nearly universally held that errors of judgment, not occasioned by willful ignorance or a reckless inattention to duty, are not evidence of negligence or a ground of civil liability.

As having a direct application to cases like the one at bar, we quote the following authorities: Thus, in *Titus v. Railroad Co.*, 136 Pa. 618, 626, 20 Atl. 518, 20 Am. St. Rep. 944, the court say: "All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of implement, or nature of the mode of performance of any work 'reasonably safe' means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and, however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed. Juries must necessarily determine the respon-

sibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community." And in *Reese v. Hershey*, 163 Pa. 253, 257, 29 Atl. 908, 43 Am. St. Rep. 795: "The average untrained mind is apt to take the fact of injury as sufficient evidence of negligence. Moreover, the use of a dangerous machine is very commonly considered ground for holding the employer responsible, whereas the test of liability is not danger, but negligence, and negligence can never be imputed from the employment of methods or machinery in general use in the business." And in *Harley v. Manufacturing Co.*, 142 N. Y. 31, 34, 36 N. E. 813: "The master does not guaranty the safety of his servants. He is not bound to furnish them an absolutely safe place to work in, but is bound simply to use reasonable care and prudence in providing such a place. He is not bound to furnish the best known appliances, but only such as are reasonably fit and safe. He satisfies the requirements of the law if in the selection of machinery and appliances he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the master liable, not a mere error of judgment. Here the belt was fastened at one of its splices with what was called the 'Buffalo Belt Fastener,' and while the machine was running the fastener gave way, and the belt parted and caused the injury to the plaintiff. It was shown upon the trial that there were several kinds of belt fasteners in use. \* \* \* Under such circumstances, how can it be said that the defendant violated any duty it owed to the plaintiff? It was impossible, from the evidence, to determine whether these fasteners were or were not the best in use for such a belt and such machinery as the defendant had at the time and place of the accident. Suppose a master, needing fasteners in his shop, makes inquiry among men of skill and experience as to the best kind of fasteners in use, and he is informed by some that one kind is the best, and by others that another kind is best, and so on, and he finally makes a selection, using his best judgment, and suppose it should turn out that it was not the best; could he, under such circumstances, be held liable for an injury received by a person in his service from the parting of a belt on account of the insufficiency of the fastener under any particular strain to which the belt had been subjected? But we may go one step further. Suppose, under such circumstances, he purchased fasteners for use in his shop, which, according to the judgment of his skilled workmen, were found to be useful, convenient, and safe, and the very best in use; can he then be charged with negligence for continuing to use them, and be made liable to one who is accidentally injured by the parting of a belt? Suppose, under the circumstances which exist here, the defendant had adopted one of the other fasteners

for this particular belt, and an accident had happened from its parting; there would have been substantially the same evidence for the jury, and the same claim could have been made which is now made,—that there was a question of fact for the jury as to its negligence in making the selection. This judgment cannot be affirmed without subjecting the master in such a case as this to the risk of liability for injuries from the parting of a belt moving machinery in his shop, whatever fastener he may use, because, if he uses one kind, according to the evidence in this case, it is easy to find persons who will testify that, from their experience and observation, some other kind was better. It must always be true that where several appliances are in use, each of which is regarded by men of skill and experience as safe and proper, the master cannot be made liable for an injury to one of his servants, if, in selecting the particular appliance, he takes what, according to his judgment, is the best or most suitable, guided by his experience and observation, and those of the skilled men in his employment. Upon the evidence in this case, it cannot even be determined that the managers of the defendant erred in their judgment in the selection of this kind of fastener. But if there was an error in judgment, it was not such as to constitute that degree of negligence and want of prudence which, under the rules of law above cited, can impose liability for such an accident as this." And in *Railroad Co. v. Hall*, 91 Ala. 112, 8 South. 371, 24 Am. St. Rep. 863, 870, it is said: "We have said many times that railroads are not required to adopt every appliance which some roads—even a majority of the well-regulated—have incorporated into their system of management. Something must be accorded to a diversity of judgment. If many well-regulated roads abstain from adopting a particular appliance, which other roads—even a majority—consider wise precautions, and adopt, such abstention cannot be pronounced, per se, recklessness or negligence." And in *McGinnis v. Bridge Co.*, 49 Mich. 466, 472, 13 N. W. 819, 821: "Railroading is at least a business with many dangers, and scarcely any machine, implement, or expedient made use of in it but is liable at some times and under some circumstances to imperil human lives. Suppose the block had been made use of, and an accident had occurred, which was thought to be attributable to it; how, on the plaintiff's theory, would the defendant have excused itself for adopting it? A jury verdict in favor of its use in a previous case could be no protection, for a verdict makes no precedent, and settles nothing but the immediate controversy to which it relates. The next jury, on precisely similar facts, is at liberty to find directly the contrary. The defendant would therefore be compelled to defend its adoption of the block by showing that it tended to make the management of trains more safe. But if the plaintiff in the suit were to proceed to show—what fully appears in this case—that, though the device had been known



for several years, the experts in charge of railroads the country over, naturally solicitous, as they must be, on grounds of personal interest, if not of humanity, to diminish the risks to life, had failed to be convinced of the expediency of making use of the block, this showing would have made out a case against the defendant which could not well have been answered. The prima facie showing that the device had been hastily, if not heedlessly, adopted, would certainly have been very strong; and if the two cases, charging respectively negligence in rejecting, and then in adopting, the same device, could go to successive juries, we might witness the instructive result of a verdict against the defendant in both. But such a result is inconsistent with a proper administration of definite rules of law and justice." And to the same effect is *Southern Pac. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391, reversing 23 Pac. 751, cited in our former opinion, and, to a like effect, *Railway Co. v. McCormick*, 74 Ind. 440.

We think that the foregoing decisions establish beyond controversy, both upon reason and authority, that an employer is not liable in damages for the consequence of mere error in judgment in furnishing structures, machinery, and appliances for the use of his servants in the prosecution of his business, unless it is shown that such error is itself the result of negligence or willful ignorance or inattention. Of this latter there is no evidence in this case, and the instruction complained of was therefore rightfully given.

We recommend that the former judgment of this court be vacated and set aside, and the judgment of the district court be affirmed.

DUFFIE, C. I fully agree with all that is said in the foregoing opinion, and think that the case should be affirmed for the reasons above given. I wish to add, however, that I think the evidence shows that the plaintiff in error was guilty of contributory negligence, and that on that account alone the law can afford him no relief.

SEDGWICK, J. On account of the importance of the question involved, and the difference of opinion of the commissioners, argument was had before the court. There can be no doubt that if the company acted in good faith, and with an honest desire to adopt the methods best calculated to promote the safety of their employees generally, as well as of the traveling public, it cannot be charged with negligence, even though we should believe from the evidence before us that the purposes the company had in view would have been better served by blocking the rails, as plaintiff contends. There is still less reason to impute negligence to the company if the evidence shows that, in the present condition of experience, it is impossible to say which method, upon the whole, affords the best guaranty of immunity from danger. It was contended upon the argument that the claim that the unblocked

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guard rail is less dangerous than the blocked rail was an afterthought, and not urged in good faith by the company, and that for this reason the case should have been submitted to the jury. Of course, the question of good faith on the part of the company in determining the advisability of blocking the guard rails is a question of fact, and as such, when in dispute, is to be determined by the jury. If there was no reasonable ground for doubt as to the better course to pursue, the company cannot defend against a charge of negligence by urging that it was in doubt, and acted on its best judgment. But if the best course to pursue, in the interest of the safety of the employees and of the traveling public alike, was an open question, and difficult to determine, the company cannot be charged with negligence in having adopted the one course rather than the other. Upon examination of the evidence, it appears that there is no dispute that the safety of the employees of the company and the safety of the traveling public are both involved in the determination of the question of the advisability of blocking the guard rails. So far as safety to the employees is concerned, there is a large mass of testimony, from which it cannot be determined with any degree of certainty which is the better practice; and when we further consider that there is much apparently reliable evidence tending to show that danger to the traveling public is increased by the practice of blocking the rails, and no evidence is offered to show that any system of blocking can be adopted without increasing that danger, we think there is an entire failure of proof that the company acted in bad faith in adopting the unblocked system.

We have therefore adopted the majority opinion of the commission, as prepared by Mr. Commissioner AMES, and the judgment of the district court is affirmed.

**PER CURIAM.** For reasons stated in the foregoing opinion, it is ordered that the former judgment of this court be vacated and set aside, and the judgment of the district court be affirmed.

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HUMPHREYS' ADM'X v. VALLEY R. CO.

(*Supreme Court of Appeals of Virginia, Dec. 4, 1902.*)

[42 S. E. Rep. 882.]

**Writ of Error.**

Where the verdict of the jury in favor of plaintiff was set aside, and a new trial granted, plaintiff taking a bill of exceptions to such action of a court, and on the second trial plaintiff introduced no evidence, and judgment was entered against him, a writ of error to the judgment raised only the question of the propriety of the setting aside of the first verdict.

**Trespassers—Contributory Negligence—Duty after Discovery of Peril.\***

Regardless of whether a trespasser on a railroad track has been guilty

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\*See foot-note appended to *Shannon v. Boston & M. R. R.* (N. H.), 4 R. R. R. 192, 27 Am. & Eng. R. Cas., N. S., 192.

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of contributory negligence, the company is bound to do all it consistently can, after discovering his peril, to avoid injuring him.

**Same—Presumption That Pedestrian Will Avoid Danger.†**

A railroad engineer has a right to presume, until the contrary is indicated, that a pedestrian on the track will take the ordinary precautions for his own safety.

**Same—Negligence—Sufficiency of Evidence. \***

Plaintiff's intestate negligently attempted to walk upon and across a railroad track, with full knowledge that a train was approaching. There was nothing in his appearance to indicate to the engineer that he would not take due precautions for his safety, and, as soon as the engineer discovered that he was likely to be in danger he reversed the engine, sanded the track, and put on full air. He testified that he could not do all these things, and at the same time sound the alarm whistle, and that the means he took were far better calculated to save the deceased than to have sounded the whistle, though on this point there was some dispute: *held*, that there was nothing in the evidence to warrant a conclusion that the engineer, after discovering the peril of deceased, negligently failed to do all he could to avoid the accident which followed.

Error to circuit court, Augusta county.

Action by Emma J. Humphreys, as administratrix, against the Valley Railroad Company. Judgment in favor of defendant, and plaintiff brings error. Affirmed.

Curry & Glenn and A. C. Braxton, for plaintiff in error.

J., J. L. & R. Baumgardner, for defendant in error.

CARDWELL, J. Emma J. Humphreys, administratrix, brought her action in the circuit court of Augusta county against the Valley Railroad Company for the recovery of damages by reason of the death of her intestate, William A. Humphreys, which she alleges was caused by the negligence of the defendant company.

At the November term, 1900, the case was tried by a jury, which rendered a verdict in favor of the plaintiff for \$4,600, and upon motion of the defendant the verdict was set aside, as being contrary to the law and the evidence. At the May term, 1901, the case was again tried, and, no evidence being offered by the plaintiff, a verdict was rendered in favor of the defendant, upon which the court entered judgment. At the first trial the plaintiff took only one bill of exceptions, and that was to the action of the court in setting aside the verdict and awarding a new trial. Therefore the only question for our consideration now is the propriety of the court's action in setting aside the first verdict. *Marshall's Adm'x v. Railroad Co.*, 99 Va. 798, 34 S. E. 455; *Chapman v. Investment Co.*, 96 Va. 177, 31 S. E. 74.

The deceased was a man 67 years of age, active, energetic, in good health, of ordinary intelligence, in possession of the senses of sight and hearing,—“a little deaf, but could hear an ordinary conversation.” For three years prior to the accident out of which this suit arises, and which resulted in injuries to him from which he died in a few days, the deceased

†See *Hebert v. Louisiana W. R. R.* (La.), 20 Am. & Eng. R. Cas., N. S., 87, and foot-note.

had lived within about 300 yards of the place where the accident occurred, in full view of the railroad and of the surroundings of the place of the accident.

The train which struck the deceased was a scheduled freight train with passenger coach attached, made up with the engine and tender, 12 loaded cars, 1 empty, and the passenger coach, and reached Verona station, where the accident occurred, about 15 minutes behind its scheduled time. On the afternoon of the day of the accident, October 17, 1899, a bright, clear day, the deceased left Staunton, and drove in an open one-horse surrey, with his wife, along the Valley turnpike, which for a considerable distance south and towards Staunton from Verona station is near to, and nearly parallel with, the Valley Railroad. On reaching the point where the road upon which the dwelling of the deceased is situated, and which crosses the railroad at Verona station, intersects the turnpike, he turned into the road leading to his dwelling. From the point where the turnpike and the road from the turnpike to decedent's dwelling intersect, the Valley Railroad is in plain view, and the view of it is unobstructed from every point on the road into which the deceased turned, from its intersection with the turnpike to its intersection with the railroad, except a partial obstruction for a short distance by a house standing on the corner at the intersection, and a small stable near the railroad. The deceased drove from the turnpike across the railroad, stopped just beyond or east of the railroad track at a point where the rear end of his surrey was about 19 feet from the center of the railroad track. While he was driving from the turnpike to the railroad crossing, William Harris, in a two-horse wagon, was driving the same road, meeting him, and in plain view of him, "whipping his horses crossing the track." Harris stopped immediately at the corner of the depot, very near the track and the crossing, and just as he "stopped and was tying his lines in order to get out and stand at his horses' heads," the deceased drove by towards the railroad, "hurrying his horse up." At that time the train was approaching in full view of Harris, and necessarily so to the deceased if he looked at all for an approaching train. After stopping on the east side of the railroad track, 19 feet from it, as stated, the deceased got out of his surrey on the right or south side, in the direction from which the train was approaching, and, according to plaintiff's witnesses, walked back to the railroad track at a point a few feet from the crossing, turned down the track toward the depot, walking on the ends of the ties a short distance, and then stepped over inside of the track, and, after taking five or six steps, was struck by the engine; but, according to defendant's witnesses, after getting out of his surrey to the right, facing the approaching train, the deceased walked diagonally to the railroad track, as if he was going directly across the track to the door of the store in the depot, and had

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gotten but one foot on the track when he was struck by the engine. The distance from the surrency to where deceased was struck—"the nearest diagonal route—is about 60 feet, and from the crossing to where he was struck is about 45 feet. When he got upon the ends of the ties nearer the crossing (if the plaintiff's view that he got on the railroad at that point be correct), the train was 40 or 50 yards, only, from him. There were a number of persons at and around the depot when the accident occurred, and all of them saw the approaching train for some distance before it got near the crossing, the track being straight, and the view of it being unobstructed for 700 or 800 yards. One or more of these persons, seeing his danger, threw up their hands, and yelled to deceased to warn him of the approach of the train. His wife, whom he had just left, seeing that he was continuing on the railroad track, or about to step upon it in front of the approaching train, attempted to warn him of his peril by "screaming" to him, but he either did not hear or see any of these warnings, or, disregarding them, continued toward the store door in the depot for the purpose of getting his mail.

With the exception as to the route taken by the deceased from his surrency to the point at which he was struck by the engine, the foregoing facts are not controverted.

Verona station was not a regular stopping point for the train in question, but it stopped there only on signal to put off or to take on passengers or freight; and, according to the evidence given by all of the defendant's employees on the train, the whistle was blown at the whistling post a few hundred yards south of the station, and the signal for stopping the train at the station, given by the conductor from the passenger coach through the two brakeman on the train and the fireman to the engineman, was answered by two short blasts of the whistle; and this is corroborated by other witnesses in the vicinity, in full view of the train, and but a short distance away, one of them watching the train from a window. On the other hand, some of the plaintiff's witnesses say they did not hear the whistle, while others say that the whistle was not blown, nor was the bell rung.

The plaintiff, the wife of the deceased, rested her case upon her own evidence; that of her daughter, Mrs. Dunsmore, who was about 300 yards from the railroad, and one Faidley, who was standing at the store door, facing the depot platform.

It is too well settled to require citation of authority that, if the proximate cause of the plaintiff's intestate's death was his own negligence concurring with the negligence of the defendant, there can be no recovery; and in the able argument of her case here it is frankly said: "It is fully conceded by the plaintiff that Humphreys was negligent by being on the track without looking and listening for the train." This would have been true if the deceased had been struck at the crossing, but, as we have seen, he was struck at a point on the



defendant's track where he had no right to be, whether he got on the track near the crossing and walked down it or stepped on it in front of the engine, and was there without taking any precautions for his own safety; for it is conclusively shown that, if he had looked or listened for an approaching train, as it was his imperative duty to do, he would have known of the approach of the train which struck him in ample time to have kept out of all danger of being struck by it. He was, therefore, a naked trespasser; and the defendant, notwithstanding it may have failed to give warning of the approach of the train, owed him no duty, save and except to do all that could be done, consistently with its higher duty to others, to save him from the consequences of his own negligent act, after his peril was discovered, regardless of whether he was guilty of contributory negligence or not. *Railroad Co. v. Joyner's Adm'r*, 92 Va. 354, 23 S. E. 773, and authorities cited. See, also, *Wood's Case*, 99 Va. 156, 37 S. E. 846, and authorities cited.

In considering the question whether or not the defendant has been guilty of such negligence, in this respect, as to render it liable for damages, it is to be borne in mind that the case is not before us as upon a demurrer to evidence, since the trial judge set aside the verdict, and some latitude must be allowed to his discretion. It is also true that the verdict of the jury is entitled to great respect, and should not be disturbed, even by the trial court, unless plainly against the weight of evidence. *Marshall v. Railroad Co.*, *supra*.

The contributory negligence of the deceased having been established,—in fact conceded,—the burden of proof was immediately placed upon the plaintiff to establish that the defendant, by the exercise of ordinary care and diligence, could have avoided injuring him after it discovered his peril. *Railway Co. v. Bruce's Adm'r*, 97 Va. 93, 33 S. E. 548, and authorities cited; *Railway Co. v. Lacey*, 94 Va. 460, 26 S. E. 834; *Railroad Co. v. Joyner*, *supra*.

Very shortly after the deceased left his surrey, he was concealed from the view of Mrs. Dunsmore by a pile of ties on the side of the railroad, and, the horse to the surrey in which the plaintiff was sitting having taken fright at the train, and run off, Faidley is the only witness examined for the plaintiff who claims to have seen the whole occurrence.

Faidley, a stranger in that locality, by occupation a painter, happened to be in the neighborhood on the occasion of this accident, and drove to Verona station in a buggy, hitched at the back porch to the west of the railroad track, and walked through the store to the door facing the railroad. His statement is: "I seen this train coming, but, in the first place, I saw the old man get out of the buggy, come behind the buggy, between the buggy and the track, and walk to the track, and step on the track. It looked to me like he was going to cross over, about three feet the other

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side of the crane, between the crane and the crossing. He stepped upon the end of the ties, walked down about even with the crane, I suppose, and stepped over inside the track, half bent over, looking down neither to the right nor to the left; and I seen the train coming. I reckon \* \* \* it was 40 or 50 yards from the old man when he stepped upon the ties,—when he first stepped upon the ties." He further says that Humphreys, after taking three or four steps upon the ties, then stepped over on the inside of the rail, the east rail, "looked like he sorter blundered, walked stiff; that the train was approaching very close then, and, after taking five or six steps, the train struck him; and that he [witness] did not think that Humphreys was in any danger when the train was 40 yards from him,"—that is, when he stepped upon the end of the ties, about 3 feet from the crane, which is 28 feet from the point where he was struck. So that, when the witness thought the deceased was in any danger, the train was necessarily nearer to him than 40 yards, running on a downgrade of not less than 4 or 5 feet to the mile, and at a speed of at least 8 or 10 miles per hour, according to the weight of the evidence.

The engineman in charge of the train, shown to be a competent and efficient employee, upon seeing the deceased leave his surrey and start towards the track, was entitled to presume that he was a person of sound mind, in possession of the ordinary human faculties, would exercise reasonable care and prudence in avoiding danger, and would not get on the track, or go so near to it as to be in danger from the passing train, without looking or listening to see that he could safely do so, and, if actually on the track, would get off of it in time to avoid injury. He (the engineman) was entitled to act upon this presumption until it became apparent to him, as a man exercising ordinary prudence, that the deceased was about to get upon the track, or dangerously near to it, or would keep on the track, without taking the precautions required of him for his own safety. This is conceded to be the general rule, with the qualification that, "if there is anything about the appearance of the person, or other circumstances, indicating to the engineman that such person is not conscious of the danger," the rule does not apply.

While this qualification is, in the abstract, proper, there is nothing whatever in the evidence to show that the appearance of the deceased was such as to indicate to the engineman that he was not conscious of his danger. Faidley says that he was walking "tolerably quick," or "going along at a pretty good lick." True, some of the witnesses say that "he was limping; walking all bent up with his head down"; that he seemed "to be bewildered"; "it looked like something was wrong"; and that the railroad hands who were at the depot in front of the deceased waived their hands and shouted to him. But none of them say that these things were apparent to the engineman.

These witnesses being within a short distance only of the deceased, it cannot be assumed that what was apparent to them was also apparent to the engineman on the train. Besides, the throwing up of hands and "shouting" to the deceased necessarily did not take place until it was apparent to the witnesses that he was in danger, and, according to Faidley's view, he was in no danger until the train was near to him,—certainly much less than 40 yards; and, in fact, to use the witness' own words, "the train was approaching very close." Therefore these circumstances do not warrant the application of the qualification of the rule of law just stated.

With the view of stopping the train at the depot to put off passengers, the air brakes had already been applied, and the speed of the train reduced, according to plaintiff's witnesses, to 8 or 10 miles per hour.

The statement of the engineman is that, when approaching the crossing, he realized that the deceased was getting in danger, and reversed his engine, put the air on full, put sand on the track, and gave the engine steam to resist the speed of the train. The train was on a downgrade, and, the appliances for stopping it having been put in use, it was drifting. He then explains that, the air brakes having been applied for the stop at the depot as was intended, the emergency brake could not be applied with as much effect; that he could not reverse his engine, put the air on full, and sand the track, and at the same time sound the alarm whistle. According to his view, the means he used were far better calculated to give the deceased a chance to escape injury than sounding the alarm whistle. This statement of the engineman as to his efforts to stop the train is corroborated by all the employees on the train. The only variance between their statement and his is, the fireman says that the engine was reversed, and the sand put on at the cattle guard, a little south of the crossing. The four expert enginemen examined, two of whom were called by the plaintiff, concur in stating, in substance and effect, that, after it became apparent that the deceased was, or likely to be, in danger, it was impossible to stop the train before it struck him, and the only criticism they make of the action of the engineman was his failure to sound the alarm whistle; but none of them undertake to say that that would have had the effect of causing the deceased to keep off the track, or to get off if he was already on it. Some of them do say that it usually has that effect, but this is entitled to little or no weight, since the plaintiff's witness Faidley, who saw the whole occurrence, says "that, if he [deceased] could have seen at all, he would have seen the train." Therefore he knew the train was coming; and if it was his purpose, as would seem to have been the case, to continue on the track until he reached the point where he intended to get off, or to cross over the track before the train reached him, it is not at all probable that the alarm whistle would have changed his purpose.

The statement of the engineman, corroborated as before stated, that he did everything in his power to stop the train when he realized that the deceased was in danger, or about to get in danger, is alone controverted by the statement of the witness Faidley, who was standing at the store door, in front of which deceased was struck, watching at the same time the deceased and the train approaching, directly in line of his vision; and he undertakes to say that the engine was not reversed, the air put on, nor the track sanded until deceased was struck. In that position it was impossible for Faidley to know from observation what was being done on the engine, and the only grounds upon which he could claim to be an expert were that years ago, before air brakes were used on a train like this, he worked five years as a brakeman on a freight train and three as fireman. Moreover, circumstances to which he and others testify do not bear out this theory of his. The deceased was struck in front of the store door, where Faidley was standing, and carried a few feet, only, on the cowcatcher, when he rolled off to the right. Only 5 or 6 of the 14 cars in the train passed Faidley before the train stopped; and when it stopped, he, as well as others, walked over from the depot platform on the narrow platform between the freight cars, and looked down at deceased, lying but a few feet nearer the engine than they were; and, although the train was to stop to put off passengers, the passenger coach was standing, when it stopped, south of the platform, which shows unmistakably that the efforts made by the engineman to stop the train were made before it struck deceased, notwithstanding the opinion of the witness Faidley to the contrary.

It is claimed, however, that defendant's witness, Peters, says that the train did not stop "a bit quicker than it would have stopped anyhow"; that, if the deceased had reached the point of collision "a second earlier or the train a second later," the accident would not have happened. Conceding that the witness is correctly quoted, what he says is to be interpreted in the light of all that he says, and it is to be borne in mind that he was testifying from the point of view of himself and eight or nine other witnesses, that the deceased approached the track diagonally from his surrey, bent on crossing it before the train reached him; and therefore the witness meant that, if the deceased had been a second earlier, or the train a second later, he would have accomplished his purpose. What the witness says is directly opposed to the statement of the witness Faidley that the efforts to stop the train were made after the deceased was struck, and corroborates the engineman in his statement that he was doing all he could to stop it.

In no view that can be taken, even of the plaintiff's evidence alone, aided by just inferences to be drawn therefrom, can it be reasonably claimed that the deceased should have

been regarded by the engineman as being in a position of danger, until he stepped over between the rails, and continued to walk down the track. Then the train was not over 30 yards from him, and, according to the witness Faidley, claiming experience in such matters, it required 50 yards by sanding the track to stop it.

Stress is laid upon the statements of Barrett and Denton, expert enginemen, introduced in rebuttal by the plaintiff, as to what effect upon the deceased the sounding of the whistle would have had. The sum and substance of what the second-named witness says is in answer to the question: "In your opinion, if the whistle had been sounded, what would have been the result?" and his answer is: "Well, sir, I could not say. I am no prophet, but it naturally would call the man's attention, if he is not deaf and dumb, and would cause him to step off to one side or the other. I don't know what would have been the circumstances in this case. That is a very natural thing to suppose. That is what the whistle is there for."

The witness Barrett, after stating that his experience had been that when a person was on the track, and the whistle was sounded, he would jump to one side of the track, was asked: "Do you think that on that occasion, under those circumstances, if the whistle had been sounded, the man would have jumped off?" and his answer was: "I am not a prophet, but I think he would." It is manifest that these answers of the witnesses are predicated upon the deceased being upon the track, and not knowing of the approach of the train. But, as we have seen, all the witnesses agree that the deceased was bound to have seen the train, if his thoughts were not fixed upon some other subject than that of his own safety or the danger of his surrounding. Faidley says, "If he could have heard at all, he would have heard or seen the train." And again, "If he could have seen at all, he could have seen the train."

The witness Barrett also says: "In the case that gentleman was in (I mean the engineer), I believe he did everything he could to stop. I believe that he gave a fair, square statement, and that he did everything that he could do, except sounding the alarm whistle." The utmost to which this witness goes as to whether the train could have been stopped before it reached deceased is that if the train at the crossing was going at 4 or 5 miles an hour, and the engine in perfect condition, "it would have stopped about where it struck the man," but, "if it was going at 8 miles, it would have gone much farther."

From the uncontradicted proof the conclusion cannot be escaped that the deceased knew that the train was approaching, and, under these circumstances, even if the expert witnesses had said that the sounding of the alarm whistle would have caused him to have gotten off the track, it would have



## Humphreys' Adm'r v. Valley R. Co

been nothing more than conjecture. The omission to sound the alarm whistle does not constitute such negligence on the part of the defendant as to justify a recovery in this case, unless it is shown that such omission was the proximate cause of the injury complained of.

"In an action to recover damages for an injury inflicted through the negligence of the defendant the burden is on the plaintiff to prove the negligence alleged, and the evidence must show more than a mere probability of negligence. It is not sufficient that the evidence is consistent equally with the existence or nonexistence of negligence. There must be affirmative and preponderating proof of the defendant's negligence." *Railway Co. v. Cromer's Adm'r*, 99 Va. 765, 40 S. E. 54. In that case, it was held that the trial court erred in refusing an instruction which told the jury "that the burden of proof is on the plaintiff to prove negligence, and that the proof must amount to more than a probability of a negligent act; that the verdict cannot be founded upon conjecture."

In *Railroad Co. v. Bruce's Adm'r*, 97 Va. 92, 33 S. E. 548, Bruce, the deceased, was a licensee walking upon the track of the defendant company, and it was contended, as in this case, that the failure to sound the alarm whistle after the deceased had been seen, or ought to have been seen, by the engineman in charge of the train, to be in a perilous position, rendered the defendant company liable in damages; but the contrary view was taken. It was said in that case that the deceased, having "neither looked nor listened for the train," remained "so engrossed in thought upon other matters that he was oblivious of what was going on around him, and that, too, when he had needlessly placed himself in a position of danger by walking upon the railroad track, when he could just as well have walked in the open space by it, where he would have been safe. The track itself warned him of danger." Being "conversant with the railroad track and its surroundings," yet "pursuing his journey upon the railroad track, with his thoughts evidently fixed upon some other subject than that of his own safety or the danger of his surroundings," he so contributed to his injury as to preclude a recovery therefor, even if there was negligence on the part of the defendant company.

What was said in that case applies with equal force to the case at bar. See, also, *Railway Co. v. Wilson*, 90 Va. 263, 18 S. E. 35; *Marks' Adm'r v. Railroad Co.*, 88 Va. 1, 13 S. E. 299; *Hogan v. Tyler*, 90 Va. 19, 17 S. E. 723.

Upon a careful consideration of the evidence in this case, the conclusion cannot be escaped that the deceased, going to the store in the depot for his mail, "walking tolerably quick," or "going at a pretty good lick," as plaintiff's witness states it, knew the train was coming, and intended to get off the track or to cross it before the train reached him, and simply made a miscalculation as to his ability to accomplish his pur-

## Smith v. Atlanta &amp; C. R. Co

pose; and that it was not within the power of the defendant's employees to avoid injury to him after his peril was discovered. And this conclusion must inevitably be reached, though there is left entirely out of view the testimony of a number of witnesses as to declarations made by the deceased, shortly after he was injured, to the effect that he knew the train was coming, but did not know it was so near to him; that he would have gotten across if his foot had not slipped, etc.; and also the statement of the plaintiff herself, made that evening or the next morning, that she begged him not to try to cross the track, or not to go upon it. She does not deny having made such a statement, but attributes the declaration to nervousness or excitement, and she is only certain that she did not urge her husband not to go upon the track when approaching it in his surrey from the west. Her statement is that, after she got home, she said that she tried to keep him off the track, but it was when he was going back there after the mail. "I tried to keep him off the track after he started back to go after the mail."

The deceased, by his own negligence and recklessness, directly and proximately contributed to the act which resulted in his death, and we see nothing in the evidence to warrant the conclusion that the employees of the defendant, after his peril was discovered, negligently failed to do all that could be done to avoid the injury to him.

It follows that we are of opinion that there is no error in the judgment of the circuit court, and it is therefore affirmed.

## SMITH v. ATLANTA &amp; C. R. Co.

(*Supreme Court of North Carolina, June 17, 1902.*)

[42 S. E. Rep. 139.]

**Injury to Employee Working near Track—Negligence—Failure to Notice Plaintiff's Inadvertence—Instruction.**

Plaintiff, according to his own evidence, was painting a "switch target" located so close to the track that he was in danger of being struck by passing trains. The track was straight for several hundred feet, with nothing to interrupt the view. Defendant's engineer ran a switch engine down the track without ringing the bell or sounding the whistle, and plaintiff continued at his work until he was struck and injured. The court instructed that he was entitled to recover if the jury found that he was in dangerous proximity to the track, and, being engrossed in his work, was inattentive to the approach of the engine, and that, such fact being evident to the operatives of the engine, they ran it on down the track without giving proper signals: *held* error, because allowing the jury to consider the continuing of his work by plaintiff as evidence that he was engrossed in his work, and on that account inadvertent to the approach of the engine.

**Liability for Negligence of Lessee.\***

A railroad leasing its road to another company is liable to a servant of the lessee for injuries caused by the lessee's negligence in the operation of the road.

Douglas, J., dissenting.

\*See *Harden v. North Carolina R. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 895, and foot-note.

Smith v. Atlanta & C. R. Co

Appeal from superior court, Mecklenburg county; Hoke, Judge.

Action by Fred Smith against the Atlanta & Charlotte Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Geo. F. Bason, for appellant.

Burwell, Walker & Cansler, for appellee.

MONTGOMERY, J. According to the plaintiff's evidence, he was engaged in painting what is known as the "switch target" on one of the tracks of the defendant in its depot yard at Charlotte, the target being about four feet off from the rail, and that in doing his work he was compelled at times to put himself in danger of passing trains; that the track where he was at work was straight for several hundred feet, and there was no obstruction to the view in either direction along the track; and that while he was engrossed in his work, and inadvertent to one of defendant's shifting engines, the engineer, without signal of bell or whistle, ran him down and injured him. His honor thought, upon the plaintiff's own evidence, that the plaintiff contributed to his own injury, and so instructed the jury; but at the same time said that such contributory negligence would not prevent the plaintiff's recovery if the jury should find that the engineer knew or could have seen that the plaintiff was in danger, and inadvertent to the approach of the engine, and ran the engine down the track and upon the plaintiff without giving notice of the approach by proper signals. The imputed negligence of the defendant is clearly stated by his honor, and, as the charge on that contention of the plaintiff is the vital point in the case, we will give the whole of it: "A breach of duty that was imputed to defendant in this case was that plaintiff was engaged in performing his work; that he was in a position of danger, and so near the track that he was liable to bring about a position of danger; that he was in a position of danger; that he was absorbed in his work in which he was engaged, and that that must have been evidence to the employees of the defendant on that engine; and while he was in a dangerous position, and evidently unaware of the approach of the engine, that this defendant, through its agent, ran that engine on him without giving him any warning or signal of its approach, and that he was knocked down and injured severely by it, and that was the proximate cause of the injury. If the jury find by the greater weight of the evidence that that is true; if you find that plaintiff was there in what you find was a dangerous proximity to that rail, and that, being engrossed in his work, he was inattentive to the approach of that engine as it came down the track; and you further find that the employees of defendant who were on the engine knew that it was evident to them that plaintiff was in that condition, and, being evident to them, they ran the engine on down the track without giving proper

signals in order to let him escape, and injury followed; and if you find that this was the proximate cause of it,—you will answer, ‘Was the plaintiff injured by the negligence of the defendant?’ ‘Yes’; otherwise, ‘No.’” The case was tried by his honor with his usual ability and painstaking care, and we find no error in any of his rulings except in this one. We have no precedent in our Reports, nor have we been able to find one anywhere upon a state of facts like those present in this case; and we have been slow, therefore, to declare as erroneous the conclusion reached by his honor. The plaintiff labored under no infirmity. He was sober, intelligent, occupied a position where he could do his work with entire safety if he would only keep watch for the passing trains. There was no obstruction of any sort to prevent him from seeing the engine which struck him, nor to prevent him stepping out of danger instantly. In *McAdoo v. Railroad Co.*, 105 N. C. 140, 11 S. E. 316, and in *Meredith v. Same*, 108 N. C. 616, 13 S. E. 137, it was decided that an engineer, who sees a person walking along the track in front of a moving engine, may act upon the assumption that the person will step off the track in time to avoid injury, if such person is unknown to him, and is apparently old enough to understand the necessity for care and watchfulness. It seems to us that such an assumption was lawful on the part of the engineer in the present case. The fault, then, with his honor’s charge, as we see it, is that he allowed the jury to consider, under the first issue, the continuing of his work by the plaintiff as evidence that he was engrossed in his work, and on that account was inadvertent to the approach of the train. The engineer, it appears to us, had the right to assume that the plaintiff, in possession of all his faculties, and not hampered by any obstructions that would have prevented his instantaneous avoidance of danger, would have stepped out of danger. It would be a difficult matter, indeed, for any important railroad system to carry on its business if each engineer of a switch engine is to stop his engine whenever he sees an employee continuing his work upon the approach of the engine, or the employee is to stop his work except for the second to step out of the way of the train.

The defendant’s contention that it is not liable for such acts as are set out in the complaint—it being alleged in the complaint and admitted in the answer that the defendant is a lessor and the Southern Railway Company the lessee of the defendant railway, and that the injury of the plaintiff occurred while the road was being operated by the lessee—cannot be entertained, and his honor’s ruling was correct in refusing to dismiss the action on that ground.

Error.

DOUGLAS, J., dissents.

**MEEKS v. OHIO RIVER RY. CO.**

*(Supreme Court of Appeals of West Virginia, Jan. 14, 1903.)*

[43 S. E. Rep. 118.]

**Accident at Crossing—Liability of Railroad.**

To excuse a railroad company from suddenly and without warning backing a freight train against a person lawfully using a public crossing, it must be shown in evidence that such person was guilty of some act of legal negligence, contributing to his injury, such as a person of ordinary prudence would not be guilty of under the same circumstances.

**Same—Backing Train—Care of Traveler.**

A person using a public crossing over a railroad is not bound to assume that the company will negligently, without warning back a motionless train against her.

**Same—Same—Same.\***

Extraordinary care or caution is not required of persons using a public crossing, to avoid the unforeseeable negligence of those in charge of a railroad train.

Brannon, J., dissenting.

(Syllabus by the Court.)

Error to circuit court, Mason county; F. A. Guthrie, Judge.

Action by Margaret Meeks against the Ohio River Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Rankin Wiley and H. P. Camden, for plaintiff in error.

Chas. E. Hogg and J. U. Meyers, for defendant in error.

DENT, P. Margaret Meeks obtained a judgment in the circuit court of Mason county on the 15th day of May, 1901, against the Ohio River Railway Company, amounting to the sum of \$2,000, for alleged injuries. This judgment was rendered on a demurrer to the evidence.

There is some objection urged to the evidence of Dr. W. P. Neale, because he testified as to what the plaintiff and her attending physician, Dr. Sayre, told him. Dr. Neale was not being strictly examined as an expert, but was being interrogated with regard to a personal examination made by himself as to the condition of the plaintiff. Of course, it was improper for him to state to the jury what the plaintiff or Dr. Sayre told him as to her condition; but he had the right, being a physician, to testify as to his personal examination, made in the manner in which physicians usually diagnose a case; and this is not only by actual examination of the organs and limbs of the patient, but inquiry as to the symptoms, pains, and otherwise. The court therefore properly instructed the jury to disregard as independent evidence the statement made by the plaintiff and Dr. Sayre to Dr. Neale, but it did not err in permitting the opinion to Dr. Neale, together with his sources of knowledge, to go to the jury, to be considered by them. In such cases the question of damage is largely with the jury, and,

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\*See foot-note appended to *Edwards v. Southern Ry. Co.* (S. Car.), 2 R. R. R. 761, 25 Am. & Eng. R. Cas., N. S., 761.



unless plainly excessive, the court will not interfere with the amount thereof. As heretofore often held, the court must look at this case as though the judgment depended on the verdict of a jury. *Teel v. Railroad Co.*, 49 W. Va. 86, 38 S. E. 518; *Shaver v. Edgell*, 48 W. Va. 502, 37 S. E. 664; *Bennett v. Perkins*, 47 W. Va. 245, 35 S. E. 8; *Gunn v. Railroad Co.*, 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575.

The facts must be regarded in the light most favorable to plaintiff. They are as follows, to wit: The defendant's railroad extends north and south through Mason City along First street. It crosses over Horton street within a square of plaintiff's residence. "The defendant also had a side track extending along First street, the switch entrance to which from the main track was 375 feet south of Horton street on First street. On down First street still further, a distance of about 1,480 feet from Horton street, the company had a switch known as the 'Hope Salt Furnace Switch.' The railroad track from Horton street south almost down to the Hope Salt Furnace switch was practically a straight track, with the view of the track from Horton street south unobstructed. There were two foot crossings over the railroad track on Horton street, one being on the south side, and the other on the north side, and being practically extensions of the sidewalk on each side of the street across the railroad track, except that these crossings were constructed of boards. On May 2, 1898, a train of freight cars pulled into Mason City from the north, and stopped on the main line on First street, with the back end or caboose of the train on the upper or north side of Horton street, with the bumpers hanging partly over the crossing, and with the rest of the train extending from there down close to the frog of the switch of the side track, 300 feet below. This train did some switching at that point, by disconnecting the engine from the front end of the train, and running it back and forth with cars in and out of the switch or side track. After this was done the engine then ran down to the Hope Salt Furnace switch, and picked up two cars there, and was backing with these two cars up the track to the main body of the train, standing just south of Horton street, as above described. Just at this time Margaret Meeks took a notion to go to her sister-in-law's house, on the other side of the track, and down First street. The train had consumed about ten minutes in doing the switching above described, and she had seen the train there five or ten minutes before she started from her house. She could see and she could hear, and she was acquainted with the premises, and it was broad daylight, and the view was unobstructed. She knew the train was there, doing the switching. Just as she reached First street the engine was coming slowly up the track from the Hope Salt Furnace switch. When she reached the crossing, or just before she reached it, she looked and actually saw the engine. At the time and place when she saw it, the engine was moving back toward the

stationary cars, because it did not stop from the time it left the Hope Salt Furnace switch until after it had passed up the track beyond Horton street. When she looked, she does not say she saw the engine moving backward, but she supposed it would go on down. No signal was given, and, if a signal had been given, she probably would have supposed it was a signal to start in the other direction. So she stepped in behind the caboose while the engine was moving back toward the stationary cars to which the caboose was coupled," and started across the tracks on the footway. The train was standing motionless, and there was no warning given that it was about to be moved back by the sudden impact of the engine and other cars, 300 feet away. When she had almost succeeded in getting by the train, the engine and other cars thereto attached struck the train with such force as to move it back suddenly about two feet, striking plaintiff and knocking her down.

From this statement, it is plain that defendant was guilty of a high degree of negligence, amounting to what is usually called "gross negligence." Its train, which was going south, stopped across a public crossing, almost blocking it, and the engine was detached, and proceeded to do the switch work. Instead of blocking the whole crossing, a narrow footway was left as an invitation to pedestrians. No one was left to guard the crossing, or to warn those passing of the backward movements of the train. The plaintiff came to the crossing, saw the train motionless, with the engine below the south end, and assuming that it was going on southward, and that it would not be moved backward without warning, started across, and was caught by the sudden backward movement of the cars. There is no pretense that the defendant was not negligent. The only defense is that the plaintiff was guilty of contributory negligence, as a matter of law. As a matter of fact, the question of contributory negligence is settled by the demurrer to evidence in her favor. This case must therefore be viewed from her standpoint. The plaintiff did not step in front of a moving train, but she stepped in the rear of a train standing still, when, without warning of any kind, it was suddenly, with immense force, hurled back against her. In the case of *Barker v. Railroad Co.*, 51 W. Va.—, 41 S. E. 148, this court held that "a railroad company cannot be excused from gross negligence on its part, although the act of the injured person contributed thereto, unless it be shown in evidence that such person was guilty of legal negligence; that is, some act of negligence that an ordinarily prudent person would not have been guilty of under the same circumstances." What act of negligence was the plaintiff guilty of, that an ordinarily prudent person would not have been guilty of under the same circumstances? She had a right to assume that the defendant would not be guilty of such gross negligence as to hurl an immense, motionless train across a public crossing without

warning to pedestrians in lawful use of such crossing. *Robinson v. Railroad Co.*, 48 Cal. 409; *McWilliams v. Mills Co.*, 31 Mich. 274; *Solen v. Railroad Co.*, 13 Nev. 106; 8 Am. & Eng. Enc. Law (2d Ed.) 420, note 3. She was not bound to presume, foresee, or take notice of gross negligence on the part of the defendant, unless in some manner warned thereof. Although she may or could have seen the engine backing toward or approaching the other end of the train, she was not bound to assume that it would strike the train with such force as to hurl it backward two feet. No such impact was necessary to couple up the train, but it was damaging to the defendant's property. Some persons are so extraordinarily prudent that they will not handle an empty gun barrel, detached from the stock, or go within ten feet of a motionless railroad car or train, especially if there is an engine in sight. This is not the kind of prudence the law requires. It protects those who use ordinary prudence from the negligence of those who do not use ordinary care. It is not possible for this court to determine, as a matter of law, that the plaintiff did not use ordinary prudence, while the negligence of the defendant in suddenly and without warning backing its train on a public crossing over which the defendant was lawfully passing is beyond question.

The judgment is affirmed.

POFFENBARGER, J. Although concurring in the decision of this case, I do not unite in the statement of facts nor the reasoning set forth in the opinion filed by Judge Dent. I am not prepared to say, nor is it necessary to say, that it appeared that the plaintiff saw the engine moving up to the detached cars for the purpose of making a coupling, and then immediately stepped behind the cars in an attempt to cross the street, thereby placing herself within two or three feet of the rear car, and that she exercised, in so doing, ordinary care and common prudence, and was therefore not guilty of contributory negligence in the premises. I do not think the testimony on this point warrants the inference, to say nothing of its failure to affirmatively establish the fact, that the plaintiff did see the engine moving up toward the cars immediately before she attempted to cross the street behind them. Her testimony is not that she saw the engine, or saw it moving up to make the connection, but only that she "saw that the engine was at the lower end." This admission is immediately followed, and in the same sentence, by this statement, "and I supposed to myself that, if it started, it would go on down." She had just come down the cross-street for more than a square, and found the crossing partially obstructed by the rear car of a long freight train. Naturally, the train, more than the engine, was the object that presented itself to her view; and the immediate cause of her danger, as she naturally assumed, if any, was the train or the rear car, and not the

engine, which was far down the track, in the distance. With her, standing at the upper end of the train, and seeing that there was no engine attached there, it was, no doubt, largely a matter of inference that the engine was at the lower end. It may have been this, or a hasty glance down the long line of cars may have revealed to her the smoke of the engine, or the engine itself, without impressing upon her the fact that the engine was actually moving up to make the connection with the cars. Nor is it true that other persons who were standing at different points on the same side of the track, at some distance from the place at which she stopped and looked, say they saw the actual movement of the engine toward the cars at or about that time. Arthur Myers is the only one who says anything that could be so construed, but he does not say that. Being asked if he knew which way the train was running when it struck her, he said, "It was backing up against the cars."

While his language refers to the engine, it does not import that he saw the engine back up against the cars. He knew that because the engine drove the cars up the track, although he may have seen the engine, but he does not say he did. Geo. Ohlinger was on the opposite side of the train, and farther down the street, and probably farther from the track, than Mrs. Meeks. At any rate, it does not appear that her opportunity to see the engine was as good as his, and no witness who stood on her side of the street testifies to having seen it immediately before the coupling was made. Again, the evidence makes it fairly clear that, at the time she stopped and looked, she was very close to the rear car. That being true, the train being a long one, and the track straight, her view of the track and engine was undoubtedly much obstructed by the long line of cars, so as to make it difficult for her to determine just what the engine was doing, as well as its distance from the detached cars. Besides this, the open space on the track was not between a naked engine and the train, for the engine had two cars attached to it, and was backing them up toward the long line of stationary cars. To one standing near the rear car, this, no doubt, tended to give an impression that the whole train—engine and all—was connected and standing still on the track. Under these circumstances. I am firmly convinced that the question whether the plaintiff saw the danger presented by the situation is one for the jury, and that the court cannot say, upon this state of facts, as matter of law, that the plaintiff was guilty of contributory negligence. It is manifest that the fact of knowledge of danger on her part is dependent upon findings for and against a number of other questions of fact involved, and it does not so clearly appear, or stand out in such prominence and so free from question or doubt, that there is no room for two different reasonable conclusions about it. The theory of counsel for plaintiff in error is that Mrs. Meeks saw the engine, must have observed that it was in motion, and thus be-

came conscious of the danger and risk in attempting to cross. This is only an inference. It is unsupported by direct testimony, and it is squarely opposed by a contrary inference in favor of the defendant in error,—equally reasonable, to say the least. By demurring to the evidence, the demurrant admits, in favor of the demurrer, all inferences of fact that may be fairly deduced from the evidence. *Mapel v. John*, 42 W. Va. 30, 24 S. E. 608, 32 L. R. A. 800, 57 Am. St. Rep. 839; *Talbott v. Railroad Co.*, 42 W. Va. 561, 26 S. E. 311; *Garrett v. Ramsey*, 26 W. Va. 345. He waives all inferences from his own evidence which do not necessarily flow from it. *Garrett v. Ramsey*, *supra*. “The evidence upon a demurrer to the evidence should be interpreted most benignly in favor of the demurree, so that he may have all the benefit which might have resulted from the decision of the case by a jury, the proper forum from which the decision has been withdrawn by the demurrant.” *Garrett v. Ramsey*, Syl. 3, approved in *Gunn v. Railroad Co.*, 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575.

BRANNON, J. (dissenting). The plaintiff was 48 years of age, in full possession of all her faculties. She had long lived near the road, knew its workings, and says she was always afraid of trains. Wanting to go down the street, she says she looked out of the window, and saw the standing train, and waited a few minutes. Then she started, with view open, in full sunlight. She saw the train still standing when she reached it. There was no obstruction to sight. She looked, and says she saw the engine at the other end of the train, of about 200 feet length. It is certain that she did see that engine backing up to the other end of the train, because it is absolutely sure that, as she approached and when she reached the crossing, it was backing; and, if she did not observe that it was backing, she should have seen it, because she could have observed it. The truth is, she thought that the train was going south, and risked crossing. Had she any right to do this? Had she any right to assume that it would go south, as she says she did? There the danger was open to her. She says there was no brakeman to warn her. This omission of the company all the more called for her to wait a minute or two, or three, or longer, when all danger would be gone. This negligence of the company does not excuse her from the duty of prudence. She says she did wait a minute, and, as the train was still, she thought she could safely cross. That engine was just about to couple then. She saw it. She saw the danger, because she herself said, as a witness, that she “ventured across.” Why should she, as a prudent person, assume she could safely cross? She could so easily have avoided danger. She assumed the risk. A high degree of prudence was then demanded of her. She used none. The railroad had preference. It had preoccupied the crossing,



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because the car overreached it. She was bound to wait. This is not all. The end car intruded two feet upon the narrow plank crossing, and she crossed, almost rubbing her shoulder against it. Why did she not do as everybody else does,—cross five or six feet, or more, from the car, and thus save herself? I think her contributory negligence denied her recovery of damages.

**ATHERTON v. TACOMA RY. & POWER CO. *et al.***

(*Supreme Court of Washington, Dec. 16, 1902.*)

[71 Pac. Rep. 39.]

**Street Railways—Collision with Team—Negligence.**

In an action for injury from the negligent running of a street car, evidence that the customary rate of speed of cars on the line was greater than allowed by ordinance, and a high and dangerous rate, is inadmissible.

**Speed in Violation of Ordinance.\***

A street railway company is not necessarily free from negligence though a car, at the time of a collision with a team, was running within the limit of nine miles an hour, fixed by ordinance, and the bell was being rung.

**Instructions.**

An instruction in an action for personal injury that "any negligence" of plaintiff is not excused is erroneous, only ordinary care being required of him.

**Same.**

An instruction should not assume, as matter of law, from the collision of a street car with a team, that there was negligence of some one.

Appeal from superior court, Pierce county; W. O. Chapman, Judge.

Action by Arthur Atherton against the Tacoma Railway & Power Company and others. Judgment for defendants. Plaintiff appeals. Reversed.

Govnor Teats, for appellant.

C. O. Bates and B. S. Grosscup, for respondents.

REAVIS, C. J. Action by plaintiff (appellant) claiming damages for personal injuries against the Tacoma Railway & Power Company, a corporation organized under the laws of New Jersey, and operating an electric street railway in Tacoma, and Steffins, the motorman and servant of said railway, defendants. The claim of damages is founded on the joint negligence of the defendants in the operation of the car. The allegations of negligence are: "That upon the evening of the 7th day of December, while the plaintiff was coming down said 21st street with a heavily loaded wagon, hauled by two horses, crossing the said railway track at the intersection of 21st and Pacific avenue, the said plaintiff was permanently

\*As to whether the violation of an ordinance limiting speed of trains is negligence, see *Edwards v. Chicago & A. Ry. Co. (Mo.)*, 2 R. R. R. 333, 25 Am. & Eng. R. Cas., N. S., 333.

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maimed and injured and wounded by the negligence of the said defendant company and its agent, servant, and motorman, Clinton A. Steffins, who was in charge of the said car No. 23, struck and collided with the plaintiff and his wagon and team while the plaintiff was on his way down said 21st street and passing over and across said Pacific avenue at the intersection of said streets. \* \* \* That, at the time and place where and when the plaintiff received the injuries aforesaid, the defendant Steffins was and for a long time theretofore had been a servant of the defendant company in charge and control of said car 23, and for a long time theretofore had been continuously motorman of said car, and said negligence of the said defendant company was done by and through its said servant then and there in its employ, and said negligence was the joint negligence of the said defendants, to wit, in running its said car from 24th street to the point of collision at an unreasonable and unlawful rate of speed to wit, at the rate of 30 miles per hour, contrary to the said ordinance of the city of Tacoma. That said unlawful and unreasonable speed was in obedience to instructions of the defendant company. That at said time of the collision, to wit, 5:30 o'clock p. m. on the said 7th day of December, 1900, and at the said place along Pacific avenue, it was dark and foggy, and the street car was run and conducted without any bells ringing or any alarms given of its approach to the said crossing of the said 21st street, and in utter disregard of the rights of vehicles crossing at 21st street, and especially this plaintiff. That the said plaintiff, when within about 100 feet of the said crossing, looked both ways up and down Pacific avenue from said 21st street, and saw the said car No. 23, which collided with plaintiff as herein charged, at or about 23d street, a distance of about 800 feet from the crossing of 21st street; and, had the said car run at a reasonable and lawful rate of speed along down said Pacific avenue towards 21st street, plaintiff would have had ample and sufficient time to have crossed the said street car track, as he had a right to do."

The city ordinance limited the rate of speed of the car, at the place where the accident occurred, to nine miles per hour. The defendants answered separately, denying negligence on their part, and setting up affirmatively contributory negligence of the plaintiff, which is stated in paragraph 1 of the affirmative defense of the railway company, as follows: "That the collision and accident complained of by the plaintiff occurred solely by reason of the careless and negligent conduct of the plaintiff in failing to take proper or any precautions to guard against the same, and in failing to take proper or any precautions to ascertain whether said car or any car was coming along Pacific avenue at said time and place, or whether it was safe to cross said street car track at said time and place, and without observing the situation at said

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time and place, and without observing the danger thereof; and, had the plaintiff used proper or any precautions in said respects, or any of them, he could have avoided said collision and said accident. This defendant further alleges that said collision and accident occurred solely by reason of the careless, negligent, and willful conduct of said plaintiff in attempting to drive across and in driving across said street car track in full view of an approaching car, and with full notice and knowledge of the imminence of said collision and of the danger thereof."

The evidence for plaintiff tended to show that he saw the car on Pacific avenue, between 700 and 800 feet away, when he was on the cross street,—21st street,—about 100 feet from the car track on the avenue; that he then believed he could safely cross before the car reached the intersection of 21st street and Pacific avenue; that there were some obstructions preventing a clear view of the car, the headlight of which he had seen, until he was about crossing Pacific avenue; that he was driving a heavily loaded van, which was covered, the covering extending a little forward of the driver's seat, and his attention, as he reached the avenue upon which were the tracks, was chiefly directed to the management of his horses. Several witnesses for plaintiff stated that no bell was sounded or signal given of the approaching car, and that the car was running at a high rate of speed, the street being downgrade, and at a rate differently stated as from 20 to 30 miles per hour. It was at the time dark, and a fog prevailed. The evidence on the part of the defendants tended to show that the bell was rung and the signals of the approaching car were duly given, and that the car was running at less than nine miles per hour, and at a moderate rate of speed. The evidence upon all the material issues was substantially conflicting. The plaintiff tendered evidence to show that the customary and habitual rate of speed of the cars of the defendant railway company on Pacific avenue was in excess of nine miles per hour, and that such cars were customarily and habitually run at a high and dangerous rate of speed. This evidence was rejected. The court instructed the jury as follows: "(1) In this case you have two questions to pass upon: First, whether or not the defendants were negligent; second, whether or not the plaintiff was careless and negligent in his conduct, and whether, by the use of proper or any precaution, he could have avoided the accident. If you find that the defendants were negligent in the manner that the plaintiff has alleged in his complaint, and that the accident did not occur by reason of the careless and negligent conduct of the plaintiff, then you can go further and inquire into the question of damages. First you must find that the negligence, if your verdict be against the defendant, did occur through the wrongful acts of the defendants, before you can inquire into the question of damages. If you find that the

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plaintiff was also negligent, as alleged in the defendants' answer, then you need go no further, and your verdict should be for the defendants. (2) The court instructs you further that the burden is upon the plaintiff to make out and establish affirmatively, by a preponderance of the evidence, the truth of all material allegations contained in his complaint, and, to enable the plaintiff to recover for the injuries of which he complains, he is bound to show affirmatively the wrongful act or omission of the defendants alleged in his complaint; he is bound to show that he sustained injuries by reason of such wrongful or negligent acts; that such injuries as he sustained and from which he now suffers, if any, were the result of such wrongful and negligent act; and said burden of proving such acts rests upon the plaintiff throughout the trial, and never shifted to the defendants, and the burden is not, and never was at any time during the trial, upon the defendant to show that the plaintiff's injuries would have resulted notwithstanding said wrongful or negligent acts."

At the request of defendants, the court gave the following instructions: "(1) The first question for you to decide is the rate of speed of the car. The only charge of negligence against the defendant in the complaint is that the car was running at a high and negligent rate of speed, and that no bell or other alarm was rung in approaching the street. The ordinance of the city of Tacoma declares that the maximum rate of speed allowed to any car on that portion of Pacific avenue where the accident occurred is nine miles per hour. If you find that the car was not running to exceed nine miles an hour at the time the accident happened, and if you find that the gong or bell was sounded at a reasonable distance before reaching the crossing, you will find for the defendant.

\* \* \* (6) You are instructed that even though you should find upon the evidence herein, under the instructions given by the court, that the persons operating the street car were in fact guilty of negligence, nevertheless such negligence would be no excuse for any negligence on the part of the plaintiff. It was his duty to approach the track circumspectly; that is, to observe his surroundings, to employ the faculties by which men are endowed for their self-preservation, and not drive carelessly into a place of possible danger; and if you believe from the evidence that the plaintiff did not observe this ordinary caution your verdict should be for the defendant. (7) It is not for you to determine in this case which party, by that I mean the plaintiff, the defendant Steffins, or the defendant the Tacoma Railway & Power Company, was guilty of the greater degree of negligence. Some one must have been negligent, or the accident would not have happened as it did. If you find from the evidence that the accident was caused by the concurring negligence of both the plaintiff and either of the defendants, your verdict should be for the defendant.

\* \* \* (10) I instruct you that the plaintiff is not to be ex-

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cused from observing his surroundings by the fact that he was in a covered wagon, and that his vision was partially obscured by the cover. A man is not excused from observation by the position in which he may place himself. That is to say, a man is not allowed to blindfold his eyes, or to place an obstruction in front of his eyes, and then make an excuse for not seeing under circumstances calling for the use of his faculties of observation. Mere inconvenience in taking a position where he could see is no excuse for not seeing. It was the plaintiff's duty before entering on a place of possible danger to use ordinary care and prudence and reasonable diligence to avoid the danger. His conduct is to be measured by all of the circumstances in evidence. Ordinary care is the care that a person of ordinary prudence would use in like circumstances. (11) If you find from the evidence that plaintiff was seated behind a cover on his wagon so that his vision from the sides of his wagon would be to some extent obscured, then I instruct you that it would devolve upon the plaintiff to use greater care and caution in approaching a place of danger than if his vision was unobscured on both sides."

The verdict upon which judgment was entered was for defendants.

1. The first error is assigned on the rejection of the evidence tendered by plaintiff to show that the customary rate of speed of the said cars on Pacific avenue was greater than the limit prescribed by the ordinance, and a high and dangerous rate. The cases cited on argument have been carefully examined, and it appears they are not in harmony upon this question. Some of those which permit the reception of such testimony have expressed doubts concerning its value, and others have also declared that its admission was not reversible error. Generally, such testimony seems to be regarded as having slight relevancy to the issue, and as rather tending to divert the attention of the jury to extraneous matters. This court seems to have approved the view held by those authorities that refuse to receive such evidence. It was observed in *Christensen v. Trunk Line*, 6 Wash. 75, 32 Pac. 1018: "In view of the fact that there must be a new trial of this cause, we will next consider some of the alleged errors in reference to the admission of testimony over the objections of appellant. It is contended that the court erred in permitting the plaintiff to show that this particular motorman had run his car at a high rate of speed upon other occasions, and we think the court did error in so doing. It was a fact collateral and irrelevant to the issue, and one which the defendant could not be expected to be prepared to rebut without previous notice. 1 Greenl. Ev. § 52." It is not deemed desirable now to disturb the ruling made in that case.

2. The errors assigned on the instructions may be considered together. From the instructions it may be generally implied that the defense of contributory negligence is some-



what emphasized. The entire case was correctly submitted to the jury upon the theory of each party, except in the first and second instructions, which contain certain words that may be subject to criticism. But some of the instructions given at the request of the defendants do not seem to be in accord with the decisions announced by this court. Instruction No. 1, given at the request of defendants, directs, if the jury find the speed of the car was within nine miles,—the limit of the ordinance,—and the bells were rung, they must find for defendants. Whether the rate at which the car is running is negligent, must be found in view of all the surrounding circumstances. Safety in the speed is relative, and depends on the facts in each case, and, where they are disputed, it must be submitted to the jury. *Roberts v. Railway Co.*, 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184. The jury had already been correctly instructed on the effect of the ordinance as a rule of care in the operation of the cars, but the duty imposed on the defendants was reasonable care in the rate at which the car was running in view of all the facts occurring at the time of the accident. In the sixth instruction it is in substance declared that negligence on the part of the defendants would not excuse "any negligence" on the part of plaintiff. This instruction, taken in connection with the first one given by the court, where it is said the second inquiry is whether "the plaintiff was careless and negligent in conduct, and whether by the use of proper or any precaution he could have avoided the accident," seems to convey the idea that slight negligence will prevent a recovery by plaintiff. This is not the rule that has been announced in this state. In *Spurrier v. Railway Co.*, 3 Wash. 659, 29 Pac. 346, the refusal of the trial court to give the following portion of an instruction: "I further instruct you that, if it appears from the evidence that the plaintiff was guilty of any negligence whatever which contributed to cause the injury complained of in this action, or concurred with the negligence of the defendant, if any, in producing it, then your verdict must be for the defendant,"—was approved. It was observed: "The latter part of the instruction is too broad. The person charged with the contributory negligence cannot be held to any greater degree of care than the company is. But the defendant asks the court to charge the jury that the defendant cannot recover if she is guilty of 'any negligence whatever'; while in demand 8 he asks the court to charge the jury that the railroad company is only held to 'exercise ordinary care and caution.' The doctrine of contributory negligence has been carried to a considerable extent by some of the courts, but, we think, never quite to this extent. Due and reasonable care and caution were imposed upon both the plaintiff and the defendant by the instructions of the court, and while many courts have undertaken to elaborate these expressions, and have occupied many pages in defining them, it

is doubtful if any instruction, however elaborate, could convey to the jury a better understanding of the law, and of the rights of the parties under the law, than is conveyed by the instructions of the court in this case. 'Due and reasonable care and caution,' said the court, 'means that degree of care and caution which might reasonably be expected of a reasonably prudent person under the circumstances surrounding him or her at the time in question.' This definition, we think, is terse, comprehensive, and correct." In *Cowie v. City of Seattle*, 22 Wash. 659, 62 Pac. 121, the following instruction was held erroneous: "You are further instructed that if you find, from a preponderance of the evidence, that the plaintiff, W. H. Cowie, was himself guilty of any negligence, and that such negligence was itself a cause of his injury, then you have no right to take into consideration the question whether the plaintiff, W. H. Cowie, or the defendant was more or less negligent in the premises; and if you find that said W. H. Cowie was so guilty of negligence which directly caused such injury, then it is your duty to find for the defendant, and it would make no difference in such case whether any defect in the sidewalk assisted in causing such injury." The court observed of this instruction: "The seventh instruction which was given to the jury at respondent's request is also erroneous, and is contrary to the doctrine announced by this court in *Spurrier v. Railway Co.*, 3 Wash. 659, 29 Pac. 346. In that case the defendant asked the court to instruct the jury that, 'if it appears from the evidence that the plaintiff was guilty of any negligence whatever which contributed to cause the injury complained of in this action, or concurred with the negligence of the defendant, if any, in producing it, then your verdict must be for defendant.' And we there held that the instruction was properly refused, on the ground that it imposed a greater degree of care on the plaintiff than the law required. The law does not require the plaintiff in an action for personal injuries to be absolutely free from any negligence whatever in order to recover, for such a requirement would impose upon him a duty of exercising extraordinary care and prudence, which is not the standard by which his negligence is measured. All the law requires of the plaintiff, in such cases, is the exercise of ordinary care, under the circumstances surrounding him, and this he may do, although he may be guilty of some slight negligence, in the broadest sense of that term." In *Redford v. Railway Co.*, 15 Wash. 419, 46 Pac. 650, it was said that when the defendant's negligence is the proximate cause of the injury, while that of the plaintiff is only a remote cause, or a mere condition of it, the defendant is still liable. The seventh instruction seems to assume, as a matter of law, that there was negligence in the happening of the accident. This was a question appropriately for the jury. The eighth and ninth instructions seem to rather emphasize the idea that the specific omissions mentioned therein constitute negli-

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gence. The second instruction of the court first set out is rather confused, but probably was relieved by the last instruction which was given, stating correctly the burden of proof in contributory negligence.

For the errors mentioned in instructing the jury, the cause is reversed and remanded for a new trial.

DUNAR, MOUNT, and ANDERS, JJ., concur.

### SANDERSON v. NORTHERN PAC. RY. CO. (two cases).

(*Supreme Court of Minnesota, Dec. 26, 1902.*)

[92 N. W. Rep. 542.]

#### Appealable Orders.

No appeal lies from an order granting a motion for judgment notwithstanding the verdict.

#### Personal Injuries—Damages—Fright.\*

There can be no recovery for fright which results in physical injuries, in the absence of contemporaneous injury to the plaintiff, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Otis, Judge.

Actions by A. W. Sanderson and Caroline Sanderson against the Northern Pacific Railway Company. Verdict for defendant in the case of Caroline Sanderson, and from an order denying a new trial she appeals.

Verdict for plaintiff in the case of A. W. Sanderson, and from an order granting a judgment for defendant notwithstanding the verdict, plaintiff appeals. Affirmed.

Charles Butts and Charles Roberts, for appellants.

C. W. Bunn and L. T. Chamberlain, for respondent.

START, C. J. The plaintiff A. W. Sanderson on May 7, 1900, with his wife, Caroline Sanderson, and their four children, aged respectively 4, 6, 8, and 12 years, boarded one of the passenger trains of the Omaha Railway at Rice Lake, in the state of Wisconsin, for the purpose of going to St. Paul, and thence over the Northern Pacific Railway to Cedro, in the state of Washington. The father and mother each had a full through ticket, and the child 12 years of age, a boy, had a through half-fare ticket. The tickets were purchased of the station agent at Rice Lake. The party transferred to the defendant's passenger train at St. Paul. Before the train reached Minneapolis, the conductor took up the tickets of the plaintiff and his wife, and the half-fare ticket of the boy, and demanded half-fare tickets for the other two children who were over 5 years old, or the payment of \$40, the price

\*See foot-note appended to *Cicero & P. St. Ry. Co. v. Brown* (Ill.), 23 Am. & Eng. R. Cas., N. S., 930.

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thereof. The father declined to pay any fare for the two children, for the reason, as he stated to the conductor, that he had an agreement with the agent when he purchased the tickets that the price paid therefor should entitle himself and his family to be carried to their destination. The conductor upon such refusal caused the child 8 years old, a boy, to be put off the car at Minneapolis, but he immediately returned into the car. The conductor attempted to get hold of the 6 year old child, a girl, to put her off, who was in a seat with her mother. In such attempt it is alleged that the conductor assaulted the mother, and that she was frightened by what took place in the attempt to remove the children from the car, whereby her health was seriously impaired. The father paid the \$40 demanded, to avoid further trouble, and the party were carried to their destination. The conductor did not tender back any of the tickets which he had taken up. The father and mother each brought an action in the district court of Ramsey county against the defendant for damages which each claimed to have sustained by reason of the premises. The action of A. W. Sanderson was brought for the recovery of damages in the sum of \$2,040, which he alleged he sustained on account of the \$40 paid, and the loss of the services and society of his wife, and for medical treatment for her, all of which were due to the injuries she received by reason of the wrongful act of the conductor. The action of Caroline Sanderson, the wife, was brought to recover damages in the sum of \$2,000 on account of personal injuries sustained by the alleged assault made upon her by the conductor, and by reason of fright and shock due to the attempt to separate her children from her. The parties stipulated to try the cases at the same time and upon the same evidence, and that one record should cover both cases, but each should be separately submitted to the jury. The trial court at the close of the evidence directed a verdict for the defendant in the case of Caroline Sanderson, and she appealed to this court from an order denying her motion for a new trial. The case of A. W. Sanderson was submitted to the jury, and a verdict was returned in his favor for \$42; being the sum paid to the conductor, and interest. Thereupon the defendant made a motion for judgment in its favor notwithstanding the verdict, and the court made its order granting the motion, from which the plaintiff appealed. The plaintiff made a separate motion for a new trial, but the record discloses no order disposing of it, and the only appeal on his part is from the order granting the defendant's motion for judgment.

1. An order granting or denying a motion for judgment is not appealable, for such an order is simply one for a judgment, or one refusing it. *McMahon v. Davidson*, 12 Minn. 57 (Gil. 232); *Rogers v. Holyoke*, 14 Minn. 515 (Gil. 387); *Bank v. Graham*, 67 Minn. 318, 69 N. W. 1077; *Oelschlegel Railway Co.*, 71 Minn. 50, 73 N. W. 631; *Kalz v. Railway*



Co., 76 Minn. 351, 79 N. W. 310. Therefore the appeal in the case of A. W. Sanderson must be, and is, dismissed.

2. The question to be determined on the appeal of Mrs. Sanderson, hereafter designated as the plaintiff, is whether the evidence tends to show any legal basis for the recovery of damages by her. The evidence relevant to her case tends to show that her husband was on the train with and in charge of his family, and that he made the arrangements for their transportation, and that the station agent of whom he bought the tickets agreed that the sum paid to him therefor should be in full for the transportation of the entire family to their proposed destination, and, further, that the rules and rates of the defendant required that each of the children over 5 and under 12 years should be provided with half-fare tickets; that when the conductor caused the boy to be removed from the train, and attempted to eject the girl because the father refused to pay their fare, the plaintiff was greatly frightened by what occurred, and as a result of such fright she was made ill, and her health permanently impaired. The evidence, however, failed to show that any assault was committed upon her by the conductor, or anything done by him to cause her to apprehend any violence or injury to herself. She testified that her injury resulted wholly from fright, and that the conductor did not touch her, any more than to crowd in by her; that is crowd her in trying to get past her to where the girl was. It may be assumed for the purpose of this decision, only, that his act was wrongful as to the children. The plaintiff's case is, then, one where it is sought to recover damages for personal injuries due solely to fright and grief because an attempt was made to put her children off the car, and one where there was no tort against her, and no fear on her part of any physical injury or personal violence. The great weight of authority sustains the doctrine that there can be no recovery for fright which causes injury without impact; that is, in the absence of any contemporaneous physical injury to the plaintiff. Notes to Gulf Ry. Co. v. Hayter, 77 Am. St. Rep. 862 (s. c. 54 S. W. 944, 47 L. R. A. 325). This rule, as thus broadly stated, has not been accepted by this court; but, with the modification hereafter stated, it is the law of this state. In the case of Renner v. Canfield, 36 Minn. 90, 30 N. W. 435, 1 Am. St. Rep. 654, the defendant shot a dog in the highway; and the plaintiff, a woman, standing near, whom the defendant did not see at the time he fired, was so seriously frightened by the report of the gun that she had a miscarriage, as the result thereof. It was held in that case that the plaintiff could not recover, for the reason that the fright was not the result of any legal wrong to her. It was held in the case of Keyes v. Railway Co., 36 Minn. 290, 30 N. W. 888, that the mental distress and anxiety which may be proven in actions for personal injuries must be confined to such as are connected with bodily injury; that fear and anxiety for the safety of



others cannot be made the basis for the recovery of damages. In the case of *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370, it was stated as a rule that no action for damages will lie for an act which, though wrongful, infringed no legal right of the plaintiff, although it may have caused him mental suffering. The case of *Purcell v. Railway Co.*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203, was one where a pregnant woman was a passenger on one of the defendant's cars, and by its negligence in the management of its cars at a street crossing a collision seemed inevitable, and she was placed in a position of such apparent imminent peril as to cause fright, which caused a miscarriage; and it was held, though there was in fact no collision and no impact, that the defendant's negligence was the proximate cause of the plaintiff's injury, and that she was entitled to recover for the consequences of her fright. It is to be noted in this case that the defendant's negligence which caused the fright was a legal wrong to the plaintiff as well as to all of her fellow passengers. In other words, the act of the defendant which caused the plaintiff's fright was a tort against her. In the case of *Buckman v. Railway Co.*, 76 Minn. 373, 79 N. W. 98, the plaintiff, a married woman, entered with her husband the ladies' waiting room in the defendant's depot; and the station agent unlawfully and untruthfully charged her companion with not being her husband, and used violent, offensive, threatening, and abusive language to him, and ordered him to leave the room, whereby she suffered a nervous shock which resulted in serious physical injuries. It was held that these facts afforded no legal basis for the recovery of damages by her, for the reason that the use of abusive language to her husband was not an infraction of her legal right, and hence not a legal wrong to her, and for the further reason, as stated by Buck, J., that: "She apprehended no danger to herself. At least, she could not reasonably do so. She was not in any place of peril. If an action of this kind can be maintained, we do not see why nervous and sensitive persons present at a riot or public disturbance cannot have a cause of action if thereby they become nervous and sick, or suffer mentally, even if they do not receive bodily injury." This *Purcell Case* has been criticised by some eminent courts, and approved by others, but it would seem that the trend of the more recent cases is to approve it. See 15 Harv. Law Rev. 304; 41 Am. Law Reg. 141. However this may be, it is the law of this state, and we are not disposed to question it, much less to overrule it. It is in entire harmony with the other decisions of this court which we have cited, for it is distinguishable from them by the fact that the fright of the plaintiff was due to a legal wrong of the defendant against the plaintiff, which was not the fact in the other cases. The question whether fright alone would constitute such injury that the law will allow a recovery for it was not involved in that case.

From a consideration of the decisions of this court cited,

*Ashworth v. Southern Ry. Co*

we hold that there can be no recovery for fright which results in physical injuries, in the absence of contemporaneous injury to the plaintiff, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant. As already stated, the plaintiff's case is not within the exception, and it follows that the trial court rightly directed a verdict for the defendant.

Order affirmed.

ASHWORTH *v.* SOUTHERN RY. CO. *et al.*

(*Supreme Court of Georgia, Dec. 10, 1902.*)

[43 So. Rep. 36.]

**Trespassers—Care Required of Railroad Company.\***

The only duty which a railroad company owes, in this state, to a trespasser upon or about its property, is not to injure him wantonly or willfully; but this rule does not relieve the company, under all circumstances, from anticipating the presence of a trespasser upon its property, and from taking proper precautions to prevent injury to him.

**Children Riding on Engine—Care Required of Railroad Company.†**

Where a number of children, ranging in age from 6 to 15 years, are, with the knowledge and without the disapproval of the employees of a railroad company in charge of its trains, permitted to board and ride upon the trains while they are passing over a sidetrack through a playground of the children to a point beyond, and while they are returning from such point to the main line of the road, the children alighting from the trains at the limits of the playground, both going and returning, and this custom is a continuous one, engaged in whenever the trains enter the playground, it is the duty of the employees of a train, who are aware of this custom, to anticipate that when the train enters the playground the children will attempt to ride upon it and alight from it at the point where they have been accustomed to do so; and they are under a further duty, consequent upon the first, to take proper measure to prevent injury to such children.

**Same—Same.**

Where, under the circumstances above detailed, a child lacking in experience and discretion, and incapable of appreciating the danger incident to his conduct, gets upon the running board behind the tank of an engine before the engine begins its return trip through the playground, and is injured while attempting to jump therefrom at the point where children have been for a long time previous continuously in the habit of alighting, the company is liable in damages for the injuries thus received, even though its employees in charge of the train have no actual knowledge of the presence of the child upon the running board of the engine. An ordinarily prudent person would, under such circumstances, have reason to anticipate the presence of the child upon the engine, and the servants of the company, as prudent men, would be required to ascertain whether the child is in fact upon the engine before beginning the return trip, and should either require him to alight, or at least stop the train for this purpose at the place where the children have been accustomed to alight.

**Sufficiency of Petition.**

A petition setting forth facts such as are above detailed should not have been dismissed on a general demurrer.

(Syllabus by the Court.)

\*See foot-note attached to *Denver & R. C. R. Co. v. Buffehr* (Colo.), 4 R. R. R. 762, 27 Am. & Eng. R. Cas., N. S., 762.

†As to the duty of a railroad company to infant trespassers, see extensive note, 20 Am. & Eng. R. Cas., N. S., 327.

Error from superior court of Floyd co Judge.

Action by Oscar Ashworth, by his next Southern Railway Company and Wyley to the petition sustained, and plaintiff versed.

Seaborn & Barry Wright, for plaintiff in Shumate & Maddox and Harris, Chas defendants in error.

COBB, J. The plaintiff brought his action against the Southern Railway Company and Wyley Hartin for damages. The plaintiff's father and the defendant company filed a demurrer to the petition upon the ground that the petition set up no cause of action. The demurrer was sustained, and the plaintiff appealed. The only ground of the demurrer insisted upon was that which set up that the petition set up no cause of action. The petition was, in substance, that on the 10th day of June, 1901, and for two or three days thereto, the defendant company used a train on its main line, a distance of half a mile from the town of Lindale, into the yard of a manufacturing company about 150 yards from the entrance to the manufacturing company's yard the track extends through the common and after leaving the common the track extends through the principal street of the village into the yard of the manufacturing company. On the day above named, and for two or three days thereto had been, used as a playground for the children of the village. It was the custom of these children to get upon the engines and cars of the defendant when they came into the common, and ride upon them while they were in the place; and when such engines and cars came out of the manufacturing company the children would jump off, and likewise when the engines and cars came out of the common for the main line the children would jump off to the ground. This was not an occasional custom, but was usually and regularly done when the engines and cars came into the common. This custom of getting upon and jump off the cars and engines of the defendant company, through the knowledge of the defendant company, through the knowledge of the defendant company, and employees who operated the trains, and a servant of the railway company, who, was in charge of the engine and cars on the day above named, was known to the plaintiff. The children who were accustomed to get upon the engines and cars of the defendant while they were in the common ranged in age from 6 to 15 years. On the day above named, the plaintiff, a child of 8 years, was upon the engine and cars of the defendant company, which was pushing a train of cars into the common, and stopped on the track in the common to pushing the cars into the yard of the manufacturing company. While the engine and cars were stopped in the common, the plaintiff, who was upon the engine and cars, fell from the engine and cars, and was injured.

of children climbed upon and into the cars; and one child, together with the plaintiff, stepped upon the running board behind the tank of the engine. In a few moments the cars were pushed by the engine into the yard. The engine itself did not enter the yard, but was reversed, and started backward, with the plaintiff and his companion on the running board. When the plaintiff and his companion discovered that the engine was going out to the main line, they jumped from the engine, as was the custom; and in doing so the plaintiff fell under the engine, which ran over his legs, cutting them off between the knees and ankles. The plaintiff had never been upon the cars or engine before that time, and was induced to do so upon the occasion in question by the unrestrained liberty of many other children, some older and some younger than himself, to so ride upon the engine and cars. The petition alleges that it was the daily custom of children, too young to appreciate the danger, at the particular place mentioned, to ride upon and jump from the engine and cars of the company, and this custom was known to defendant company and to Wyley Hartin. It is alleged that no reasonable, serious, and effective effort to keep the children off the engine and cars at this particular place had been made by the employees of defendant who operated the engine and cars, or any one else, and this was known to defendant company and to Wyley Hartin; that the children could have been kept off and away from the engine and cars by ordinary and reasonable care and effort; that knowledge of the presence of the children put the defendant company and Wyley Hartin upon the legal notice of the presence of the plaintiff upon the running board of the engine at the time of his injury, and imposed upon defendants the duty of examining the cars and engine before starting for the main line of the road, and of removing the plaintiff therefrom; that the injury was occasioned by the negligence of defendants; and that the plaintiff was without fault, he being an infant of eight years.

Notwithstanding the plaintiff was an infant of immature years, he was wrongfully upon the running board of the company's engine, and was therefore a trespasser. The only duty which a railroad company owes a trespasser is not to injure him wantonly or willfully, and ordinarily this rule imposes upon the company simply the duty of taking proper precautions after the presence of a trespasser in a position of peril has been discovered. It will not do, however, to lay this down as an absolutely invariable rule. A railroad company may by its own acts and conduct impose upon itself the duty of anticipating the presence of trespasser in such a position. Indeed, in no case would the servants of a railroad company in charge of its train be warranted in closing their eyes to avoid seeing a person of whose presence they had had previous warning, or when under the circumstances, they ought to have known of his presence. In referring to the duty of a







in this connection, *Williams v. Railroad Co.* (Mo.) 9 S. W. 573; *Railroad Co. v. Plaskett*, 47 Kan. 107, 26 Pac. 401; *Whalen v. Railroad Co.* (Wis.) 44 N. W. 849; *Railroad Co. v. Smith* (Mich.) 9 N. W. 830, 41 Am. Rep. 177; *Townley v. Railroad Co.* (Wis.) 11 N. W. 55; *Railway Co. v. Jenks*, 54 Ill. App. 91, 96; 3 Elliott, R. R. § 1260; *Hopk. Pers. Inj.* § 87. If a railroad company expressly invites or tacitly permits persons to be upon its premises, or in or about its machinery, the company owes to such persons the duty not only not to injure them when their presence becomes known, but also to anticipate their presence at the time when or the place where such invitation or permission would probably bring about their presence, and to take such measures as ordinary prudence would require to prevent injury to them if they are in fact present. A railroad company is the owner of its right of way, its track, and its machinery, and is entitled to exclude therefrom others who have no interest or right therein. A railroad company which continuously permits persons to be upon its right of way, or in or about its machinery, at given times and places, is put on notice by this conduct on its part that such persons may be present at such times and places; and by this conduct it imposes upon itself the duty not only to prevent injury to such persons, but to anticipate their presence, and take the precautions of an ordinarily prudent person to prevent injury to them. Let these principles be applied to the allegations of the petition in the present case. It is alleged that a sidetrack of the defendant company extended through a village common used by the children of the village as a playground, and that, with the knowledge of the company and its servants in charge of its engines and cars, these children were accustomed to board the engines and cars as they came through the common, and ride upon them to the limits of the common. On the occasion upon which the plaintiff was injured, the children, following the usual custom, and without any objection being raised by the employees of the company, got upon a switch engine and the cars attached thereto for the purpose of riding the length of the common. If the allegations of the petition are true, it is impossible to conclude that the servants of the company in charge of the engine and cars did not know that the children had boarded them; and as it was the custom of the children to ride out toward the main line, to the end of the common, ordinary prudence would require that the employees of the company should anticipate that some of them would remain on the engine or cars until the end of the common was reached. Negligent ignorance is, in law, the equivalent of knowledge; and, if the servants of the company knew the children were aboard the cars or upon the engine, it was their duty to stop the train and require them to get off. Instead of doing this, the train was allowed to proceed on its way, thus allowing small children, inexperienced and without discretion, to alight

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from the moving train. The plaintiff in this case was a boy eight years of age, probably incapable of appreciating the danger of alighting from a moving train, especially when guided by the example of an older boy who was his companion. The plaintiff was on the running board of an engine which was moving backwards, and, according to the allegations of the petition, the servants of the defendant company had, as reasonably prudent persons, sufficient grounds to anticipate his presence upon the engine, and, in legal contemplation, knew he was there, were aware of his perilous position, and yet took no steps to protect him against his ignorance and inexperience. The allegations of the petition make a case of wanton and willful injury,—not willful in the sense of intentional, but willful in the legal sense, growing out of a failure to anticipate the plaintiff's presence and provide against his injury, when it should have been done.

Railroad companies may not be bound to anticipate that children will be allured by passing trains, and attempt to board and ride upon them. But when the right of way of a railroad company extends through a place used by a number of children, of ages varying from 6 to 15 years, as a playground, and when these children are accustomed continuously, every time the train enters the playground when they are upon it, to swarm upon the train and ride to the limits of the playground, and when the employees of the company know of this custom and make no objection to it, the company is bound to carry the burden which such a knowledge and tacit permission impose, and this burden would require the company to comply with the demands of ordinary care for the prevention of injury to the children. In *Railroad Co. v. Popp* (Ky.) 27 S. W. 992, the railroad company had two cars stationed on a side track near a depot for the purpose of being attached to an excursion train. Children of all sizes were in the habit of going about the depot building and grounds for pastime and amusement, and this was known to the servants of the company in charge of the train by which the plaintiff, a small boy, was injured. It appears that the plaintiff and a companion went into one of the vacant cars to get ice water, and remained in the car, loitering about, for some time; the plaintiff remaining on the platform. When an engine with four cars attached was backed for the purpose of making a coupling to the car on which the plaintiff was standing, he became frightened, and endeavored to get on the bumper of the car, and, while making this attempt, was caught between the backing car and the bumper, and was injured. There was no evidence that the employees in charge of the train actually saw the plaintiff in time to avoid injuring him, but the company was held liable on the theory that under the circumstances of the case they were bound to anticipate his presence there, and to take proper measures to prevent injury to him. In *Thompson v.*

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Railroad (Tex. Civ. App.) 32 S. W. 191, the petition alleged that the plaintiff, a child 12 years of age, was injured while attempting to board a moving freight train at a public crossing which was much frequented by children and the public generally. It was alleged that the plaintiff and other children were, within the knowledge of the employees in charge of the train, in the habit of boarding trains at that crossing and riding a distance, and that the fact that the plaintiff was attempting to board the train when he was injured either was known to the employees operating the train, or could have been known by the exercise of ordinary diligence. It was held that the declaration set forth a cause of action. In *Tully v. Railroad Co.* (Del. Sup.) 47 Atl. 1019, 82 Am. St. Rep. 425, a boy was killed while on an empty stationary car of the defendant company. There was evidence tending to show that the employees of the company actually knew of the boy's presence upon the car, and evidence of a custom on the part of children to play in the empty cars of the company was held to have been properly rejected, solely for the reason, however, that inasmuch as the employees, under the evidence, actually knew of the boy's presence, evidence of the custom was immaterial. In *Harriman v. Railroad Co.* (Ohio) 12 N. E. 451, 4 Am. St. Rep. 507, the company was held liable for injuries received by a boy from an exploding torpedo which had been picked up by the boy, and which the company had placed on its track at a point where the plaintiff and other children, together with the general public, had, with the knowledge and without the disapproval of the company, been accustomed to cross the track. The recent case of *Railroad Co. v. Abernathy* (Tex. Civ. App.) 68 S. W. 539, is very similar to the present case. In that case the company was engaged in ditching and leveling up its roadbed with a steam plow within the limits of an incorporated town. The construction train used by the company consisted of an engine and three or four cars, and the steam plow and scraper were attached to this train. The machinery and apparatus were new to the residents of the town, and attracted many children and grown people to see them operate. From the time the work was commenced, numbers of small boys, from 5 to 18 years of age, were attracted by the train and machinery, especially before and after school hours, and on Saturdays all day, ranging in numbers from 10 to 50. The boys were permitted by the employees to ride upon and be in and around the train, in the caboose, on the steps, on the flat cars, around the air machinery, in the cab of the engine, on the cowcatcher, along and upon the right of way, and in front of the plow and behind it. The son of the plaintiffs, a boy 10 years of age, was seen by a bystander riding upon the pilot attached to the tender of the engine, and, when first seen by the employees of the company in charge of the train, was lying across the track rail, just in front of the back wheels of the tender, and then it was impossible to prevent the train

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from running over him. The employees of the train did not know that the boy was on the pilot attached to the tender of the engine. The court ruled: "Where children are on or about a work train so frequently that a person of ordinary prudence will apprehend danger to them, the fact that employees do not know that a child is on the train, in a dangerous position, does not relieve the railroad company from liability from an accident resulting therefrom." In the opinion, in discussing whether the court properly submitted to the jury the question whether the employees of the defendant ought to have anticipated the boy's presence on the pilot of the engine, it is said: "If, as a matter of fact, boys of immature years and discretion were on and about the train so frequently that persons of ordinary prudence would have apprehended danger to them, although the employees at the time did not know deceased was on the train, then it devolved upon the employees to use ordinary care to ascertain whether or not some were on the train and prevent injury." This case is to be distinguished from the case of *Underwood v. Railroad Co.*, 105 Ga. 48, 31 S. E. 123, in that there were in that case no allegations in the petition from which it appeared that the employees in charge of the train had reason to apprehend that Underwood was upon or about the train at the time of the injury. It was alleged that he had, previously to the injury, been in the habit of climbing upon and riding on the moving trains of the defendant at that place, but there was no allegation which would charge the employees with knowledge of his presence on the train at the time of the injury. The court erred in dismissing the petition. Of course, when the trial is had, it will be necessary to submit to the jury the question of contributory negligence of the plaintiff; and for the rules governing in cases of this kind see *Hopk. Pers. Inj.* § 7 et seq.; *Tully v. Railroad Co.*, *supra*.

Judgment reversed. All the justices concurring, except LUMPKINS, P. J., absent.

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*LIVINGSTON et al. v. WABASH R. Co.*

(*Supreme Court of Missouri, Dec. 16, 1902.*)

[71 S. W. Rep. 136.]

**Child on Depot Platform—Care Required of Trainmen.**

If a child takes fright and runs across a depot platform in a manner to indicate to a person of ordinary prudence that it will run upon the track, and the engineer of a train entering the depot sees, or by the exercise of ordinary care can see, it in time to avoid an accident, but negligently fails to do so, the company is liable.

**Same—Same.**

It is not sufficient for the engineer to merely use due care to avoid the accident after the child is actually on the track.



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**Same—Same—Instruction.\***

An instruction that "the mere seeing, or capacity of seeing, a person walking or running along at or near the center of a platform 15 to 18 feet wide, almost paralleling a railroad track, will not of itself demand in law of an engineer that he stop to inquire the intention of such person," while abstractly correct as applied to persons of discretion, has no application to a child  $3\frac{1}{2}$  years old.

**Same—Same—Same.**

An instruction that the law will not "hold a railroad company responsible for the sudden impulse of any spectator, who, from fright or panic, rushes suddenly and unexpectedly within two to four feet, and in front of a moving train," was not applicable to a case where a child ran 50 feet diagonally across a depot platform towards the track, its course indicating that it was aiming to reach a trunk platform on the other side of the track.

**Same—Contributory Negligence of Parent.**

The fact that a child run over by a train was at the depot unattended is a circumstance which may be considered in connection with the other evidence in determining whether its mother permitted it to be there unattended, though there was no express evidence that she permitted it to be there.

**Same—Care Required of Trainmen.**

A locomotive engineer has no right to assume that a child  $3\frac{1}{2}$  years old, running across a depot platform toward the track, will stop before crossing it.

**Same—Same—Evidence.**

It was error for the court, on plaintiff's asking defendant's expert what was the proper thing for an engineer of a locomotive coming into a depot to do if he saw a child approaching the track as though going on it, to modify the question so as to make it ask whether, if an engineer should see a child running on a public platform, where there were a lot of people, he would naturally feel that it was going on the track, or that it would be taken care of, or would take care of itself; it appearing from the evidence that the child, which was  $3\frac{1}{2}$  years old, was actually running toward the track.

Sherwood and Robinson, JJ., dissenting.

In banc. Appeal from circuit court, Macon county; Andrew Ellison, Judge.

Action by Joseph Livingston and others against the Wabash Railroad Company. Judgment for defendant, and plaintiffs appeal. Reversed.

The following is the opinion of the court in division No. 1:

VALLIANT, J. Plaintiff's child,  $3\frac{1}{2}$  years old, was run over and killed by a locomotive drawing a passenger train of defendant near its depot in the city of Macon in March, 1896, and this suit is to recover damages for the act, which, plaintiffs allege, was caused by the negligence of defendant's servant in charge of the locomotive. The petition alleges three acts of negligence, viz., running the train at a speed of more than six miles an hour, in violation of a city ordinance; failure to give signals; and failure to stop the train in time to save the life of the child, after its perilous condition was discovered, or could have been discovered by the exercise of ordinary care on the part of the engineer. Those acts were denied in the

\*See extensive note, 20 Am. & Eng. R. Cas., N. S., 327 et seq.



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answer, which contained also a plea of contributory negligence on the part of the child, and on the part of the plaintiffs in permitting the child to wander unattended upon or near the railroad track. The trial in the circuit court resulted in a verdict and judgment for the defendant, and the plaintiffs appeal.

It was shown at the trial that the defendant's railroad runs on a line north and south through the city of Macon; that just south of its depot it crosses the Hannibal & St. Joseph Railroad on an elevated tressel or bridge. From the bridge northward to and beyond the point of the accident the track is straight, and the view unobstructed. There is a platform 16 feet wide along the east side of the track from the bridge to and beyond the depot and beyond the point of the accident. The depot abuts this platform on the east side. Sixty-one feet north of the depot, on the same side, also abutting the platform, is a baggage room, opposite to which, across the track, is a trunk platform 47 feet long. From the bridge to the north end of the depot the distance is 199 feet. From the north end of the depot to the south end of the baggage room it is 61 feet, so that from the bridge to the south end of the trunk platform opposite the baggage room, which is the point of the accident, the distance is 260 feet. On the west side of the railroad track, 35 feet from the bridge, is a water tank. From the water tank to the point of the accident it is 225 feet. There was an ordinance of the city forbidding such trains to run faster than 6 miles an hour within the limits. This train crossed the bridge at the rate of 20 miles an hour, and, slowing down, passed the depot at 10 miles an hour, and, still slowing down, stopped with the baggage car about opposite the baggage room, which was the usual place of stopping. At the instant of striking the child the locomotive was not moving exceeding 6 miles an hour; possibly not faster than 3 miles. As the train came over the bridge, the little girl, with her brother, who was five year old, was at the fence within a few feet of the north end of the depot. At that time three young men were standing on the west edge of the platform opposite the south end of the depot, apparently dangerously near the railroad track; and when the locomotive was between the bridge and the tank, the engineer, seeing the young men, sounded the danger signal of several sharp blasts of the whistle, and applied the emergency brake. The young men moved readily away from the position of danger, and as the engine passed them the engineer, looking at them, called out to them, saying, "It's a wonder you would not stand on the track and get killed!" When this danger signal was sounded the little girl broke away from her brother, and ran in a north-westerly direction diagonally across the platform towards the trunk platform, and ran upon the track at a point about the south end of the trunk platform, where she was struck by the engine, and was carried or rolled along, no one knew how, to

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near the north end of the trunk platform, where she fell, and the wheels of the engine passed over her, killing her. The witnesses differed in their estimates of the distance in front of the engine at which the child got upon the track, varying from 30 feet to 3 or 4 feet. The engineer did not see her at all, and did not know that the accident had occurred until his engine had come to a stand, and he had come down from the cab to oil the machine. From the point at the fence where the child was when it started to run to the point where it started to cross the track is estimated at 50 feet, or 18 steps. Several witnesses saw the child as she was running along the platform, and from the course she was pursuing apprehended that she was running into peril. One witness turned his back to avoid seeing her struck by the locomotive. The child wore a red dress. William Ross, the engineer in charge of this locomotive,—a witness for defendant,—testified: That when he saw the three young men too near the track he was running 20 miles an hour. He sounded the danger signal, and applied the emergency brake. The young men moved away readily; and that, after he passed them, he released the emergency brake, and the engine rolled on past the depot at the rate of 10 miles an hour. That, if he had been running only 6 miles an hour, he could have stopped within 35 to 50 feet by using the emergency brake, or without that brake he could have stopped in 30 feet by reversing the engine. He testified that after passing the young men he looked ahead, and saw a large crowd on the platform in front of the depot; that he did not see the child. “Q. Were you in a position to see to the north as well as one who is within three or four feet east of your track? A. I don’t know whether I was or not. I was sitting higher than they. My head was about seven feet above the level of the sidewalk; that is, above the platform. I expect I could see north as well as those opposite to the window where I sat. I think I was in a position at least to see as well as they could. Q. What was your speed when you struck the child first, as has since been explained to you? A. At that time when I struck the child the engine could not have been going over 6 miles an hour. As I passed the north end of the depot the train was running 9 or 10 miles an hour. I can stop quicker when running 6 miles an hour than when running 10 miles an hour. The faster a train is going, the longer it takes to stop. The child was found at the north end of that trunk platform. [That platform is 47 feet long.] That platform comes up about level with the rails. Q. If you had let the emergency stop stay on, in what distance should your train have come to a standstill? A. It would have stopped in about 270 feet. Q. As it was, how far did your train run? A. I don’t know. Beyond the platform anyhow. I looked at the men as I passed them. That child could not have been seen from where those men were under any circumstances. Q. If you had looked, and seen the child, would you not have let

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your emergency stop remain on? A. I would if I had seen the child; yes, sir. I would have done anything I could to stop. Q. Now, would not your train have come to a stop, if you had left the emergency stop on, before you struck the child? A. Most assuredly, if it came on where the men say it did. \* \* \* If I had seen the child down where I made the emergency brake, I could have stopped before striking her.' James Foster, a locomotive engineer, an expert witness for defendant, on cross-examination said: "Q. Just take it now as Mr. Ross said it was. Say he was running 20 miles an hour as he passed the steps, and went into the emergency; then slowed it down, until, when he was passing the north end of the depot, he was running ten miles an hour. Under those circumstances, if you had seen that child running in a northwestern direction towards your track, what would you have done, having released the emergency just as he said he did? A. I would have applied my air, because I would expect to get better results from it. It would be a detriment to reverse the engine. Q. What good would applying the air do? A. It would be better, probably, than to reverse the engine. Q. Explain what it would do—applying the air? A. It would take hold. It would have a tendency to stop the train, if you gave it time enough. It would take about two seconds. It would have slowed up or stopped before it reached the child. It would slow up, I expect, by the time it went that distance, as near as I got it. If I had seen the child running in a northwestern direction towards the track as they say, I would have applied my brake. A. That would be my judgment. If it was so close that my judgment would teach me that it was going on the track, I would have applied my air. When you go into the emergency, and use 15 or 20 pounds, you couldn't then use the balance of the air. It wouldn't have done any good." All the expert testimony tended to show that after the child got on the track, under the circumstances indicated in Engineer Ross' testimony, it was impossible to have stopped in time to have saved its life. R. L. Hewitt, a locomotive engineer, an expert witness for defendant, so testified, and on cross-examination this occurred: "Q. Had you seen the child running in a northwesterly direction towards your track, indicating that it was going to run upon the track—Mr. Grover: If your honor please, we object to this line of inquiry. Our liability does not arise until we see the child in a dangerous situation. The mere fact that the child was running on the platform does not occasion a liability on our part. While the child was running, it was not upon the track. By the Court: The objection is sustained. Mr. Dysart: If it please the court, we think we have evidence tending to show the actions of this child—the direction it was running, and everything—gave indications that it was going upon the track. Several persons—the defendant's own witnesses—have testified that they thought it was going to run upon the track,

and some of them screamed. We are asking to prove the conduct and motions of the child before it got upon the track. By the Court: The objection is sustained. You are confusing the province of the jury with expert testimony. Mr. Dysart: We started to ask a question based upon this theory: That the child was running towards the railroad, towards a dangerous point. By the Court: Mr. Dysart, the witness could not blind the jury on that question. I can only repeat, without going into particulars, leave the matter for the jury." M. W. Burk, a locomotive engineer, an expert witness for defendant, testified that under the circumstances detailed by Engineer Ross it was impossible for him to have avoided the accident, even if he had seen the child when it first got on the track. On cross-examination he was asked: "Q. If you had been in Mr. Ross' position, and had seen that child approach the track as though it was going on, what would you have done?" Defendant objected and the objection was sustained. The court said: "I excluded that question a while ago. I will permit it to be asked in a modified form. He can ask, if an engineer saw a child running along a public platform, where there is a lot of people, is it customary—would he naturally slow up the train, or would he suppose the child would be taken care of? Mr. Grover: We still object to the question, even in the modified form. The child was in no danger at all until it got upon our track. By the Court: I don't think we differ a particle, Mr. Grover. Say an engineer saw a child running along a plank platform 16 feet wide, a crowd of people there, what would he naturally do?" To the modified question the witness answered: "If there was anything in the movement of the child to impress the engineer with the thought that it was liable to get on the track, of course he would attempt to stop the train, if there was something to impress him that the child was liable to get on the track. By the Court: The question is, would he naturally feel that it was going on the track, or naturally feel that it would take care of itself? A. I think he would feel the other way,—that it wouldn't go on the track." To these rulings on the evidence exceptions were duly taken.

The court gave the jury the following instructions:

At the request of plaintiffs: "(1) The jury are instructed that if they believe and find from the evidence that defendant approached and passed the depot at a greater rate of speed than six miles an hour, then such rate of speed was excessive, and negligence on the part of the defendant. And if you further believe and find from the evidence that such excessive speed caused, or materially contributed to, the death of the child; or if you believe and find from the evidence that defendant's engineer saw the perilous position of the child upon the track, or about to place itself in a perilous position upon the track, or that he could have seen and known it by the exercise of ordinary care; or if you believe and find from

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the evidence that such omissions of duty and acts of negligence, if proven, contributing together, caused or materially and directly contributed to the death of the child,—then your verdict should be for the plaintiff. (2) Although you may believe from the evidence that the engineer gave the danger signal for Deering and others on or near the track, and exhausted a part of his air to slow his train to avoid injury to them, and that it was a matter of prudence for him to do so, yet, so soon as the engineer discovered that said parties were off the track, and in a position of safety, then it was his duty to be on the lookout for the safety of persons on the depot platform; and if you believe from the evidence that said engineer negligently failed to do so, and thereby failed to see the child, and in consequence thereof the child was struck and killed in consequence of his negligence,—then your finding should be for the plaintiff. (3) You are further instructed that it is conceded in this case that the engineer did not see the child before she was struck and killed. Now, if you believe from the evidence that he could have seen her, by the exercise of ordinary care, in time to stop his engine before he struck her, or in time to slow his train for the child to cross over the track before being struck, but negligently failed to do so, then your finding should be for the plaintiff. (4) You are further instructed that in coming into a station, such as that at Macon, the law required the employees of the train to be watchful, and on the lookout, to avoid accidents and injury to those on or about the platform. And if you believe from the evidence that in coming into the station at Macon the defendant's engineer or other servants of the defendant saw the child in a perilous position, or saw it about to place itself in a perilous position by running upon the track, or could have seen the same, by the exercise of ordinary care, in time to have avoided the injury and saved the life of the child, but negligently failed to do so, then the defendant is liable, and the finding must be for the plaintiffs. (5) If you believe from the evidence that the child took fright and ran across the depot platform in a northwesterly direction towards the railroad track, while the engine and cars were approaching, in a manner to indicate to a person of ordinary prudence and caution that she intended to and would run upon the track, and that defendant's engineer or other employees saw her, or could have seen and known of her design and peril, by the exercise of ordinary care, in time to have avoided the injury and saved her life, but negligently failed to do so, then the defendant is liable, and the verdict must be for the plaintiffs, although you may further believe from the evidence that the engineer did not have time to stop the train and avoid striking her after she got upon the track. (6) You are further instructed that in this kind of action the measure of the recovery is fixed by the law at \$5,000. Therefore, if your verdict and finding be for the plaintiffs, you should assess the damages at said sum of \$5,000."



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At the request of defendant: “(1) Although the jury may find from the evidence in this case that at the time when and place where Myrtle Livingston was killed the defendant’s engine was moving at a rate of speed in excess of six miles per hour, yet if they further find from said evidence that after the dangerous situation of said Myrtle Livingston was discovered upon the track, or could have been discovered by the exercise of ordinary care, and that said engine was then running not to exceed six miles an hour, and that it was then and there impossible for said engineer to stop said engine in time to avoid striking and killing said Myrtle Livingston, then they are instructed that the plaintiff is not entitled to recover in this action, and your verdict must be for defendant. (2) Although the jury may believe from the evidence that plaintiff’s child got upon defendant’s track from 2 to 15 feet in front of defendant’s moving engine, and that defendant’s engineer saw it, or by the exercise of ordinary care might have seen it, still if the jury believe, from the evidence, defendant’s engineer had, just a few yards south of the depot, discovered the apparent peril of others upon the track, and had used his best efforts to stop the train, and applied the emergency air brake to avert a collision with them, and was then unable to stop his train, still moving, in time to save the child, then the verdict must be for the defendant, if they believe from the evidence the child got upon the track after the speed of the train was reduced to six miles an hour, and then too late for the engineer to stop the train by the exercise of ordinary care. (3) Although the jury may find from the evidence in this case that the engineer in charge of the locomotive then attached to the defendant’s train at the time and place in question did not see the child before the train struck and killed her, and that, if said engineer had looked, he could have seen the child before striking her with the engine, and that, after first applying the emergency brake on the engine in order to avoid striking or injuring the witness Deering and others before reaching the place where said child was struck and killed, that said engineer had not exhausted all the air upon his engine in the effort to avoid injuring said men, and, if he had seen said child, there still remained at his disposal 55 pounds of air on said engine, to be used in stopping the speed of said train, and that said 55 pounds of air was not used by said defendant’s engineer in order to avert the injury and death of the child, yet if they further find from the evidence that, after making the first application of air to said engine, a period of time from 10 to 20 seconds would have elapsed before said engineer could have applied said air again, even if he had seen the said child and observed its danger, and that before said additional air could have been used and the speed of the said train then and there slackened thereby, said train, running at the speed it was then going, would still run upon and injure the child, even though said child was

from two to fifteen feet from the engine when it came upon defendant's track, then you are instructed that plaintiff cannot recover, and your verdict must be for the defendant. (4) If the jury believe from the evidence that defendant's train was approaching the station at Macon, and when near the same saw one or more parties upon or in dangerous proximity to the track, and the engineer in charge thereof sounded the danger signals and applied his emergency air brakes, and as he passed the aforesaid parties he spoke to and admonished them, and looked to see that they all had escaped danger, and while his said engine was still in motion, and while the said engineer was still impressed by the apparent danger that the aforesaid men had placed themselves in, and his attention attracted thereby, the child of plaintiffs escaped from the custody of its elder brother, or from a place of safety where he had left it, and ran along or near the center of the platform 15 or 18 feet wide, almost paralleling the tracks of defendant, when it suddenly started across the track directly in front of the moving engine, and within two or four feet thereof, and was caught and killed, then the verdict must be for the defendant. (5) The mere seeing, or capacity of seeing, a person walking or running along at or near the center of a platform 15 to 18 feet wide, almost paralleling a railroad track, will not of itself demand in law of an engineer in charge of a train that he stop to inquire the intention of such person; nor will the law hold a railroad company responsible for the sudden impulse of any spectator who, from fright or panic, rushes suddenly and unexpectedly within two or four feet and in front of a moving train; and, if the evidence shows that such facts are true of plaintiffs' child, then the verdict must be for the defendant. (6) There is no presumption of law or fact that upon a crowded depot platform any of its occupants will suddenly leave the crowd, and rush immediately in front of a moving train. (7) If the jury find from the evidence in this case that at the time and place here in question the plaintiffs' daughter, a child between three and four years of age, suddenly stepped upon defendant's track, and was simultaneously thereafter struck and killed by one of defendant's engines then and there attached to a train then and there moving on said track, then you are instructed that plaintiffs cannot recover in this action, and your verdict must be for the defendant. (8) In passing upon the question of negligence the jury should consider all the facts and circumstances proven in evidence, as well as the apparent danger of the witness Deering upon the track, the natural effect it had upon the engineer, if any, and the crowded condition of the platform, if proven. (9) If, from all the facts and circumstances proven, the jury believe the killing of plaintiffs' child was one of those unforeseen and unavoidable accidents, then the verdict must be for the defendant, no matter how sad and mournful the result proved to be. (10) By the term 'ordinary care,' as used in

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the foregoing instructions, the jury are instructed that such precaution or care is meant as would be exercised by a prudent man under like circumstances, and situated as defendant's engineer then was prior to the striking and killing of Myrtle Livingston, as shown by the evidence in this case. (11) If the jury find from the evidence in this case that the mother of the child whose death is here sued for negligently permitted said child and its little brother, both of tender years, to wander unattended upon the platform, track, and depot grounds of defendant at Macon at the time in question, whereby said child was afterwards struck and killed by one of defendant's moving engines, then they are instructed that the plaintiffs cannot recover in this action, and your verdict must be for the defendant, even though you should further find from said evidence that defendant's engineer then and there in charge of its engine failed to discover the dangerous situation of said child before it was struck and killed by said engine, and that said engine was then and there running at a rate of speed in excess of six miles per hour, unless the jury find from the evidence the engineer saw the danger of the child in time to have prevented it, or by the exercise of reasonable care might have seen it. (12) The jury are instructed that the mere fact, if it be a fact, that at the time and place in question the plaintiff's child was running along the depot platform in a northwest direction to, parallel to, and approaching defendant's railroad track, did not require defendant's engineer to stop his engine or check its speed, or to observe the movements of said child upon said platform, as said engineer had a right to presume that said child would stop on said platform in a place of safety before reaching or attempting to cross said track; nor is the defendant liable in this case because engineer either failed to observe the movements of said child on said platform or check the speed or stop his engine because of said movements of said child. (13) The court instructs the jury that the burden of the proof in this case is on the plaintiffs, and it devolves upon the plaintiffs, before they can recover, to establish their case by a preponderance of the evidence to the reasonable satisfaction of the jury."

To the action of the court in giving the said instructions, and each of them, the plaintiffs at the time excepted, and saved their exception.

1. From the instructions given at the request of the defendant and from the ruling on the defendant's objections to the evidence it is very clear that the case was given to the jury on the theory that the defendant was not liable for the failure of the engineer to observe the child before it got on the railroad track, even if by looking he could have seen it. In one of the instructions given at the request of the plaintiffs the jury were told that the defendant was liable if the child took fright and ran across the depot platform in a northwesterly direction in a manner to indicate to a person of ordinary

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prudence and caution that she intended to and would run upon the track, and the engineer saw, or by the exercise of ordinary care could have seen, her in time to have avoided the accident, but negligently failed to do so. The law was properly declared in that instruction, and there was substantial evidence on which to base it. Several witnesses saw the child as she was running, and realized the peril. The engineer was in as good position to see it as those witnesses were, as he himself said; and if he had seen it before he released the brake he said he could have stopped in time to have avoided the accident. But he was apparently provoked at the conduct of those foolhardy young men, and yielded to an impulse to administer to them a well-merited rebuke; and the circumstances in evidence afford the plaintiffs ground to contend, as they do, that, if he had not yielded to that impulse, but had looked ahead as soon as the young men moved out of danger, he would have seen this child running into peril, and could have saved its life. But the instructions given at the request of the defendant are in direct conflict with that instruction. In the first instruction for defendant the jury are told, if, at the time the engineer discovered, or by the exercise of ordinary care could have discovered, the child on the track, it was impossible to stop the train in time to save the child's life, the verdict must be for the defendant. That instruction was in accordance with the view of the law the learned counsel for the defendant urged during the introduction of the evidence when he said, "The child was in no danger at all until it got upon our track." The child was running into danger, as all who saw it realized before it reached the track. More than one of the defendant's expert witnesses—locomotive engineers—said, in effect, that, if they had seen the child running in a northwesterly direction in a manner to indicate that it was going upon the track, they would, if in charge of the engine, have made every effort to stop the train. But that a child running as some of the witnesses said this child was, was running into peril, is the observation of common sense, and requires no expert testimony. All of the defendant's instructions ignore the duty of defendant's engineer to have observed the movements of the child before it actually got on the track, and in this they were erroneous. The fourth instruction for defendant gives to the conduct of the engineer in looking at and speaking to the young men in question as he passed them the character of duty to see that they had escaped danger. But the evidence of the engineer himself was that he saw the young men move away from the place of danger readily on the sounding of the alarm signals when he was down by the water tank, so that by the time he reached them he was under no duty to give them any further attention. The defendant's fifth instruction lays down an abstract principle applicable to persons of discretion walking or running on a platform paralleling a railroad track, but it

has no application to a child  $3\frac{1}{2}$  years old. Nor does the evidence justify the hypothesis of a sudden and unexpected rush of a spectator in front of a moving train. This child ran 50 feet diagonally across the platform towards the track, and her manner and course indicated that she was aiming to reach the trunk platform on the other side of the track. The sixth and seventh instructions are liable to the same criticism. We see no valid objection to defendant's eleventh instruction. Whilst there was no express evidence that the mother permitted the child to be at the depot unattended, yet the fact that the child was there unattended is a circumstance which the jury might consider with any other evidence that might be in the case bearing on the question of whether the mother had so permitted. Defendant's twelfth instruction goes to the length of telling the jury that the defendant's engineer was not bound to observe the child while running on the platform in a north-west direction approaching the track, nor to check the speed of the engine, as he had a right to presume the child would stop on the platform before reaching or attempting to cross the track. That would be a proper declaration of law applicable to the person of mature years, but is wholly inapplicable to a child of  $3\frac{1}{2}$  years. 7 Am. & Eng. Enc. Law (2d Ed.) 405.

2. The ruling on the evidence was also error. The plaintiffs sought to ask the defendant's expert witness—a locomotive engineer—what was the proper thing for an engineer in the position of the one in charge of this engine to do if he had seen a child approach the track as though it was going on; but the court modified the question so as to make it ask, if an engineer should see a child running on a public platform, where there were a lot of people, whether he would naturally feel that it was going on the track, or that it would be taken care of, or would take care of itself. The question, as modified, left out of view the direction in which the child was running, and assumed that the people there were in a position near enough to the child to rescue it, or that the child has sufficient discretion to take care of itself; neither of which assumptions were justified.

For the errors above mentioned the judgment is reversed, and the cause remanded to the circuit court to be retried according to the law as herein expressed. All concur.

Dysart & Mitchell and Chas. P. Hess, for appellants.  
Geo. S. Grover, for respondent.

PER CURIAM. The foregoing opinion by VALLIANT, J., in division No. 1 is adopted as the opinion of the court in banc. BURGESS, C. J., BRACE, MARSHALL, GANTT, and VALLIANT, JJ., concur. SHERWOOD and ROBINSON, JJ., dissent. The court is of the opinion, however, that the instructions given for the plaintiffs should be modified in the following particulars, viz.: Instruction 2, instead of saying that, after the engineer saw that the young men had moved



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off the track into a position of safety, "then it was his duty to be on the lookout for the safety of persons on the depot platform," it should say then it was his duty to be on the lookout in the direction in which his engine was moving. Instruction 4, the words "or other servants of the defendant" should be omitted. Instruction 5, so much of the sentence as reads, "and the defendant's engineer or other employees saw her, or could have seen and known of her design and peril by the exercise of ordinary care, in time to have avoided the injury, and saved her life," etc., should be changed to read, "and the defendant's engineer saw her, or by the exercise of ordinary care would have seen her, in time to have avoided the injury, and saved her life," etc.

## GRAY v. ST. PAUL CITY RY. CO.

(*Supreme Court of Minnesota, Oct. 31, 1902.*)

[91 N. W. Rep. 1106.]

**Accident at Crossing—Duty of Motorman to Look Out for Children.\***

Where street railway tracks occupy a street at the foot of an incline which, in conjunction with other streets, forms a system of crossings in a populous part of the city, it is the duty of the motorman in charge of a car coming down the grade to keep a lookout for young children approaching the crossings or standing near the tracks, and to take reasonable precaution to prevent injury to them, by sounding the gong, checking the speed of the train, and holding it under control.

**Duty of Those in Charge of Street Cars to Avoid Obstructions—Ordinance.†**

A certain ordinance reads as follows: "No person having the control of the speed of a street railway car passing in a street shall, on the appearance of any obstruction to his car, fail to stop the car in the shortest time and space possible": *held*, this ordinance is not unreasonable, in that it requires the stopping of the car without regard to the safety of the train and the persons therein. It is no more than a declaration of the law, and only requires the persons in charge of the car, upon the appearance of an obstruction, to stop the car as soon as possible under the circumstances, with due regard for the safety of the passengers.

**Assignments of Error.**

Other assignments of error considered, and *held* to be not well taken. (Syllabus by the Court.)

Appeal from district court, Ramsey county; Kelly, Judge.

Action by Henry M. Gray, as administrator of the estate of Charles H. Gray, deceased, against the St. Paul City Railway Company. Verdict for plaintiff. From an order denying a motion for a new trial, defendant appeals. Affirmed.

\*As to the care required of those in charge of street cars to avoid injuring children, see note appended to *Sample v. Consolidated Light & Ry. Co.* (W. Va.), 1 R. R. R. 380, 24 Am. & Eng. R. Cas., N. S., 380.

†As to the care required of those in charge of street cars to avoid collisions with persons, animals, or vehicles, see note appended to *Robinson v. Louisville Ry. Co.* (C. C. A.), 1 R. R. R. 838, 24 Am. & Eng. R. Cas., N. S., 838.

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Munn & Thygeson, for appellant.

S. P. Crosby and Chas. N. Dohs, for respondent.

LEWIS, J. At the foot of Oakland avenue, in the city of St. Paul, Ramsey street, Oakland avenue, Pleasant avenue, and Garfield street cross each other; and Oakland avenue runs up a steep incline, on a grade of 3.66 feet per 100, and is occupied by defendant's street railway system, consisting of double tracks, and at the foot of the grade the tracks turn upon a curve in Ramsey street. The crossings are in a populous part of the city, and in frequent use. On the 19th day of January, 1901, at about 3 o'clock in the afternoon, Charles H. Gray, an infant, 5 years and 9 months of age, was struck by one of defendant's cars at or near the crossing on the south side of Ramsey street at its intersection with Garfield street, and received injuries from which he died. This action is brought by the administrator to recover damages for the boy's death. At the trial below, plaintiff recovered a verdict of \$2,750. Defendant appealed.

First. Was there any evidence reasonably tending to show that defendant was guilty of negligence? Second. Was error committed by the court in giving certain instructions to the jury? Third. Was a certain ordinance of the city admissible in evidence? Fourth. Did the court err in permitting testimony to be received as to the distance the car ran after the accident?

1. The charge of negligence against the defendant is as follows: The deceased, in company with a little girl about nine years of age, had left his home, on the north side of Ramsey street, in order to go to a store on the other side of the street car tracks; and as the children approached the tracks the motorman of the car coming down the Oakland avenue grade could have seen the children, and should have anticipated that they would either attempt to cross the tracks ahead of the car, or that they would be in such close proximity as to be in danger, and that under such circumstances it was the duty of the motorman to have had his car under control, and checked its speed. That the car came down the hill at a rapid rate, and crossed Garfield street without giving any signal, and in consequence the boy was struck. According to the testimony of the little girl, Eleanor Lynch, she and the little boy came down the sidewalk on the north side of Oakland avenue, skipping alone until they reached the curb, and then, hand in hand, walked towards the car tracks to cross the street. That she saw a west-bound car going up the hill, and that they walked on until they came upon the north track, and reached that point just as the fender of the front car of the east-bound train passed them, and she told the little boy to look out for the car; but he, excited over a runaway which had occurred on Ramsey street, pulled his hand away from her and ran towards the passing train, and was struck by the platform of

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the second car. Another witness, who was in the front car of the train, testified that as the car approached the crossing she looked out over her shoulder, and noticed the children running in the street towards the car, and that they stopped on the north track just as she passed them. Several witnesses testified to the speed at which the car was running; some saying it was running rapidly; one stating that it was going as fast as a horse would ordinarily trot; and several witnesses testified that they heard no gong ring at that crossing, although they were in positions to hear it. Witnesses testified that the car did not stop at Garfield street, but finally stopped at a distance of from 120 to 160 feet east of the place where the boy was struck. Other witnesses testified that the car stopped at Garfield street to take on a passenger, and that it was running slowly when it struck the boy. The vision of the motorman as the car came down the incline was unobstructed, and the children might have been seen, not only as they walked along Oakland avenue, but as they approached the tracks upon the crossing. The motorman testified that he saw some children upon the north side of Oakland avenue, as he was going down the grade, but that he did not look to the left as he approached the crossing, and did not know whether the children he saw were this little boy and girl. In view of this testimony, we think it was a question of fact, for the jury to pass upon, whether or not, under the circumstances, the persons in charge of the car were in the exercise of such care as should be exercised at a crossing of that character under such circumstances. If it was true that the train came down the grade at a rapid rate, and crossed Garfield avenue without giving any signals or slowing up, and the motorman did not look to see whether any persons were approaching the crossing at that point, then we think the jury were justified in holding the defendant guilty of negligence. In the decision of this case we assume that there was no contributory negligence on the part of the deceased, or the little girl in charge of him, or of the parents. The boy was non sul juris, and that question is eliminated by concessions of defendant. It can make no difference that the front part of the car had passed the children, and that the boy came in contact with the second part or rear of the train, for the evidence tended to show that they were either standing in close proximity to the cars at the time the motorman passed them, or that they were approaching it with the intent of crossing the track, either upon a walk or running. It was for the jury to say whether it was reasonably to be apprehended that such young children might run into or come in collision with the car as it was passing. In *Strutzel v. Railway Co.*, 47 Minn. 543, 50 N. W. 690, the children were unlawfully crossing the street; but certainly no less degree of care would be required from the railway company in a case where an injured person was lawfully possessed of the street.

2. In the course of the court's charge the following language was used: "But on the other hand, you are instructed that it is the duty of the motorman to keep a reasonable lookout for children or others that may be not only on, but in a dangerous proximity to, the tracks, in the operation of its cars on the streets; and if you find from all the evidence that the motorman in this case, in the exercise of reasonable diligence and care, should have seen the child or children sufficiently near the track to have caused a man of reasonable prudence to believe that the child might be injured, \* \* \* then it was the duty of such motorman to have so operated said car as to prevent the injury, or such threatened injury, if the same could have been prevented by the exercise of reasonable care." Exception is taken to this part of the charge upon the ground that it assumes the children were standing upon the track, or so dangerously near to it that the motorman should have discovered them. The first part of the charge states the proposition in the abstract, but we do not think the remainder of the charge is susceptible of the criticism made. It does not merely assume that the children were standing in a dangerous place, but its more natural import is that if the children were in a dangerous position, and the motorman could have seen them by the mere exercise of reasonable care, then it was his duty to use reasonable diligence in preventing an injury. However, if the language of the court was susceptible of the meaning put upon it by defendant, and likely to mislead the jury, it was the duty of counsel to call the court's attention to it at the time.

3. Ordinance No. 893 of the city of St. Paul was introduced in evidence against defendant's objection. The ordinance reads as follows: "No person having the control of the speed of a street railway car passing in a street shall, on the appearance of any obstruction to his car, fail to stop the car in the shortest time and space possible." The objection is that the ordinance is unreasonable, in that it requires the person in charge of a street car to stop it under all circumstances, without regard to the safety of the train or persons therein. This ordinance, when given a reasonable construction, is no more than a declaration of the law, and its meaning is very evident. No more is required than that the person in charge of a train shall, upon the appearance of any obstruction, stop his car as soon as possible under the circumstances, with due regard for the safety of the passengers.

4. A witness was permitted to testify that the car ran a certain distance after the accident. This was proper as bearing upon the general conduct and control of the train as it came down the hill and passed the crossing, even though the motorman made no effort to stop the car until signaled to do so by the conductor, for the bearing it might have upon whether the train stopped at the Garfield street crossing, and

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whether the motorman slowed up, or kept a proper lookout for persons approaching the crossings.

5. While the amount of damages, as found by the jury, would seem to be somewhat large, considering the age of the child, yet we are not disposed to disturb it, since it appears from the record that this is the second trial of this action, and that two juries have returned the same verdict. A verdict for a greater amount was sustained in *O'Malley v. Railway Co.*, 43 Minn. 289, 45 N. W. 440.

Order affirmed.

RALEIGH HOSIERY CO. *et al.* *v.* RALEIGH & G. R. CO. *et al.*

(*Supreme Court of North Carolina, Nov. 11, 1902.*)

[42 S. E. Rep. 602.]

**Fires Set by Locomotives—Presumption of Negligence.\***

Where, in an action against a railroad company for loss by fire, it is proved that the fire was communicated by one of defendant's engines, a presumption of negligence arises therefrom; and the burden is then shifted to defendant to show that it used approved appliances, and that the damage was from some extraordinary cause, beyond defendant's control.

**Same—Fuel.**

In an action against a railroad company for damages from fire caused by sparks emitted from an engine, an instruction that, if the use of anthracite coal lessened the danger of throwing sparks from the smokestack, it would be negligence not to use such coal, was properly refused.

Appeal from superior court, Wake county; Allen, Judge.

Action by the Raleigh Hosiery Company and others against the Raleigh & Gaston Railroad Company and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Battle & Mordecai, Womack & Hayes, Busbee & Busbee, and Shepherd & Shepherd, for appellants.

Day & Bell and F. H. Busbee, for appellees.

DOUGLAS, J. This was an action originally brought by the hosiery company to recover damages for losses by fire alleged to have occurred through the negligence of the defendants. Upon their own motion, the insurance companies were made parties plaintiff, for the purpose of participating in the recovery to the extent to which they may have paid the losses. The determination of this appeal practically depends upon a single point,—whether the presumption of negligence arises from the fact, found or admitted, that the defendant's engine set fire to the property. This point is directly decided in *Hygienic Plate Ice Mfg. Co. v. Raleigh & G. R. Co.*, 122 N. C. 881, 29 S. E. 575, frequently called the "Ice Company Case," where Furches, J., speaking for a unanimous court, says on page 888, 122 N. C., and page 577, 29 S. E.: "When

\*See *Alabama G. S. R. Co. v. Taylor* (Ala.), 21 Am. & Eng. R. Cas., N. S., 135, and foot-note, 136.



## Raleigh Hosiery Co. v. Raleigh &amp; G. R. Co

the origin of the fire is fixed on the defendant, the presumption then arises that it was guilty of negligence, and the burden rests upon it to show that it used approved appliances in the operation of its road to prevent the emission of sparks and cinders, or that the damage was caused by some extraordinary cause over which defendant had no control." Citing 2 Shear. & R. Neg. § 676; Lawton v. Giles, 90 N. C. 374; Ellis v. Railroad Co., 24 N. C. 138; Aycock v. Railroad Co., 89 N. C. 321. To these authorities may be added Moore v. Parker, 91 N. C. 275; Haynes v. Gas Co., 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; Wood, Ry. Law, 1580; 2 Thomp. Neg. §§ 2284, 2285; 13 Am. & Eng. Enc. Law (2d Ed.) 498. Ellis' Case, cited by the court in Hygienic Plate Ice Mfg. Co. v. Raleigh & G. R. Co., supra, is the leading case, in which Gaston, J., for the court, lays down the rule of presumed negligence as follows: "We admit that the gravamen of the plaintiff is damage caused by the negligence of the defendant. But we hold that when he shows damage resulting from their act, which act, with the exertion of proper care, does not ordinarily produce damage, he makes out a prima facie case of negligence, which cannot be repelled but by proof of care, or of some extraordinary accident which renders care useless." In Lawson, Pres. Ev., the rule is thus stated: "Rule 19b. But when the thing is under the management of the defendant, and the accident is such as ordinarily does not happen if those who have its management use proper care, a presumption of negligence arises from the happening of the accident." In subsection 2 the author says: "A.'s property is destroyed by sparks from the locomotive of a railroad company. The presumption is that the sparks were negligently emitted." Numerous cases are cited. The rule in Ellis' Case is further strengthened by the practically universal acceptance of the principle that where a particular fact, necessary to be proved, rests peculiarly within the knowledge of a party, upon him rests the burden of proof. Selma, R. & D. R. Co. v. U. S., 139 U. S. 560, 567, 11 Sup. Ct. 638, 35 L. Ed. 266; Mitchell v. Railroad Co., 124 N. C. 236, 32 S. E. 671, 44 L. R. A. 515; Hinkle v. Railway Co., 126 N. C. 932, 938, 36 S. E. 348, 78 Am. St. Rep. 685, and cases therein cited. The condition of the engine was peculiarly, and in fact exclusively, within the knowledge of the defendant.

The court below charged the jury as follows: "If the jury should find from the evidence that the fire originated from the defendants' engine, this would not of itself cast the burden on the defendants to prove that the engine was properly equipped with spark arresters and skillfully operated." In this there was substantial error, for which a new trial must be ordered.

There is one other exception which we will briefly notice. The plaintiffs requested the court to charge as follows: "That

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if the jury shall find that the use of hard or anthracite coal in an engine lessens the danger of throwing sparks or fire from the smokestack, it is negligence not to use such coal." This instruction his honor properly refused. The courts have no powers of legislation. They cannot say that railroads shall use certain fuel or appliances. The most that courts can say is that if a railroad company or any one else fails to use such reasonable care in the selection and use of its fuel and machinery as a man of ordinary prudence, dealing with his own affairs, and having a due regard for the rights and safety of his fellow men, would use, then such failure becomes actionable negligence. This is but an exemplification of the ancient maxim, "Sic utere tuo ut alienum non lædas." We are not prepared to say, as a matter of law, that a man of ordinary prudence would, under present conditions, adopt the use of anthracite coal if he could conveniently burn any other kind of fuel.

New trial.

## CHICAGO TERMINAL TRANSFER R. CO. v. GRUSS.

(*Supreme Court of Illinois, Dec. 16, 1902.*)

[65 N. E. Rep. 693.]

**Accident on Track—Negligence after Discovery of Peril—Willfulness or Wantonness.**

Where defendant backed its train over a trestle over which its servants knew passengers were passing with intent to enter the train, and a brakeman on the rear car saw the danger to plaintiff on the trestle, and warned her when the train was 100 feet distant, but made no effort to stop the train or signal the engineer, who testified that he could have stopped the train within 30 feet after having received a signal to do so, and plaintiff was struck, it was a question for the jury whether defendant's servants in charge of the train were guilty of willfulness or wantonness.

**Same—Same—Same—Trespassers.\***

That plaintiff who was injured while crossing a railroad bridge, was a trespasser, was immaterial, where the evidence established that the injury was willful or wanton.

**Same—Passengers Walking on Bridge—Licensees or Trespassers.**

Where a large number of passengers on an excursion train, including plaintiff, walked across a railroad bridge on which plaintiff was injured by being struck by a train, and returned the same way, whether plaintiff was on the track by the implied permission of the railroad company or was a trespasser was a question for the jury.

**Instructions.**

Where the substance of instructions refused is embodied in instructions given, such refusal is not error.

**Personal Injuries—Damages—Elements.**

An instruction that, in determining the amount of damages plaintiff is entitled to recover, the jury should consider the nature of her physical injuries, her suffering in body and mind, and such future suffering and loss of health as plaintiff has sustained or will sustain by

\*As to the care due trespassers on track, see foot-note appended to *Brooks v. Pittsburgh, etc., Ry. Co. (Ind.)*, 1 R. R. R. 521, 24 Am. & Eng. R. Cas., N. S., 521.

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reason or such injuries, her loss of time and inability to work, and moneys necessarily expended, or for which she has become liable, for doctors' bills, and may find such sum as under the evidence will be a fair compensation for the injuries plaintiff has sustained or will sustain, so far as such damages and injuries are claimed in the declaration, is proper.

Appeal from appellate court, First district.

Action by Agnes Gruss against the Chicago Terminal Transfer Railroad Company. From a judgment in favor of plaintiff, affirmed by the appellate court (102 Ill. App. 439), defendant appeals. Affirmed.

This is an appeal from a judgment of the appellate court affirming a judgment for \$6,000 recovered by appellee in the superior court of Cook county for personal injuries. On June 25, 1899, Agnes Gruss, the appellee, who was then about 16 years of age, became a passenger on one of the trains of the appellant, the Chicago Terminal Transfer Railroad Company, at Chicago, to go to Blue Island, she having purchased a round-trip ticket for an excursion, it being a Sunday excursion to Blue Island and Calumet Grove, near by. The train was crowded with passengers, and when it reached the depot at Blue Island a great many of the passengers, appellee among them, went south over a trestle railroad bridge to said grove, some distance south of the bridge, the gate to which grove opened on the railroad right of way. This bridge was about 250 feet long, and at least from 12 or 20 feet high, with no planking on it, there being only the rails laid on the ties, and persons passing over the bridge were obliged to walk across the ties. About 5 o'clock the appellee, with many others, started back to the depot and across the bridge to take the train. The evidence tended to prove that the trainmen knew that the passengers were returning to the train over this bridge. A number crossed over and boarded the train before it began to move backward over the bridge. After appellee and others had begun crossing the bridge, the train, which had been standing about 150 feet from the north end of the bridge, started to back toward and across the bridge at a speed of from 2 to 10 miles an hour, as testified to by different witnesses. Charles De Land, a brakeman and witness for appellant, testified that he was on the rear platform as the train backed towards the bridge; that when it started he cleared the platform of passengers to give him room, thinking he might want to use it; that the train stopped within about 100 feet of the bridge, and then started again; that just as the train reached the bridge he saw appellee and others on the bridge, and that she was about the middle of the bridge, about 50 feet away, when he first noticed her particularly; that she turned and ran back about 50 feet, while the train was gaining on her, and then stopped, and he attempted to signal the engineer to stop the train, but could not, on account of the crowd. The train ran back about 35 feet after striking

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appellee before it stopped. John Kotoski, a young man, attempted to help appellee to get off the track, but there was not room enough on the bridge outside of the track for the cars to pass them, and they were both knocked off and injured. The action was the same as that in which said Kotoski obtained judgment in *Railroad Co. v. Kotoski*, 65 N. E. 350, but this case was tried at a later term, and there was some difference in the evidence. No bell or whistle was sounded, but De Land testified that he whistled with his mouth all the way back. The engineer testified that he could have stopped the train within 30 feet, but that he got no signal. The declaration charged in some of the counts that the injury was caused by the negligence of the appellant, in the usual form, and in others that the injury was willfully and wantonly inflicted.

Jesse B. Barton, for appellant.

John F. Waters and Johnson & Pegler, for appellee.

CARTER, J. (after stating the facts). We are of the opinion that the evidence tended to prove that appellant was guilty of wantonly backing its train against the appellee and injuring her, as charged in the declaration. It appears that the train ran back a distance of 100 feet after the brakeman had discovered and knew her perilous position on the bridge. As the engineer testified, he could have stopped the train within 30 feet after having received a signal to stop. It was a question for the jury, under all the circumstances in evidence, whether appellant's servants in charge of the train were guilty of willfulness or wantonness or not. If they were, the liability of the appellant would follow, whether appellee was a trespasser or not in going upon the bridge. *Martin v. Railway Co.*, 194 Ill. 138, 62 N. E. 599, and cases cited. The instruction to find for the defendant was properly refused.

Under the charge of negligence merely, the court refused to give an instruction declaring, as a matter of law, that appellee was a trespasser. There was evidence that a large number of the passengers on this particular excursion train walked across the bridge after they arrived at Blue Island, and that they returned the same way. Whether appellee was on the track by an implied permission of appellant, or was a trespasser, was, under the circumstances, a question for the jury to decide, under proper instructions from the court. A number of instructions on this question were given for appellant, leaving the question to the jury. There was no error in refusing to give the instruction that she was a trespasser. The substance of the other instruction asked by appellant and refused is embodied in the instructions that were given.

Appellant objected to the giving of the sole instruction that was given for appellee. This instruction related solely to the question of damages, and is almost identical with plaintiff's third instruction, set out in full in *Railway Co. v. Brown*, 193

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Ill. 274, 61 N. E. 1093; and the same objection is now urged against it that was urged in that case. The same instruction, in substance, has been before this court a number of times, and has uniformly been approved. *Railway Co. v. Brown*, supra, and cases cited.

Finding no error in the record, the judgment is affirmed.  
Judgment affirmed.

BEERMAN v. UNION R. CO.

(*Supreme Court of Rhode Island, July 2, 1902.*)

[52 Atl. Rep. 1090.]

**Street Railway Crossing—Negligence—Track—Duty to Look.\***

Where a man driving a very gentle horse, hitched to a light wagon, in a locality with which he was familiar, on a street which crossed an electric railway, drove out of said cross street and up to the track at a slow trot, and without change of the rate of speed until the instant the horse was struck by a rapidly approaching car, which the driver had not seen, though he could have seen it in ample time to have stopped had he looked, he was guilty of negligence, and could not recover for the injury so sustained, even though the motorman was also negligent in failing to ring the bell; the rule requiring a man to look before crossing a steam railway being equally applicable to an electric railway.

Action by Joseph Beerman against the Union Railroad Company. Heard on petition of the plaintiff for new trial after a verdict for defendant. Petition denied.

Argued before STINESS, C. J., and TILLINGHAST and ROGERS, JJ.

James A. Williams, for complainants.

David S. Baker, for defendant.

ROGERS, J. This is the plaintiff's petition for a new trial after a nonsuit in an action on the case for negligence growing out of a collision between the plaintiff's carriage and the defendant's electric car at the corner of Camp and Lippitt streets, in the city of Providence. The evidence showed that on July 28, 1899, the plaintiff lived on Lippitt street, a little west of Camp street, and but a short distance from the place of the accident, with which location and the running of the defendant's cars he was thoroughly acquainted, having been in the habit of driving over the same at frequent intervals; that on said last-mentioned date, between 6 and 7 o'clock in the evening, he was on his way home from Pawtucket in an open two-seated carriage, containing his wife and a child on the rear seat, and a gentleman friend, a child, and himself on the front seat; that he was driving down Lippitt street, and approaching Camp street from the eastward, said streets run-

\*As to the duty to stop, look, and listen, before crossing street railway tracks, see foot-note appended to *Pieper v. Union Traction Co. of Philadelphia (Pa.)*, 2 R. R. R. 811, 25 Am. & Eng. R. Cas., N. S., 811; *Chisholm v. Seattle Electric Co. (Wash.)*, 1 R. R. R. 635, 24 Am. & Eng. R. Cas., N. S., 635.



ning practically at right angles with one another; that his horse was a big, heavy one, very gentle, and quite old, as he was "pretty old" when plaintiff bought him six years before the accident; that he was driving—in his own words—"not very fast, just simply jogging alone, trotting slowly; that is the only way that horse can go;" that he was holding the reins very tight going down hill, as it is a descending, but not a steep, grade there; that he occupied the right side of the front seat, and the carriage was on the right side of Lippitt street, as he approached from the east towards Camp street; that on the right or northeast corner of Lippitt and Camp streets was a high, close board fence on the street line, which would obscure his view of a car, if one should be coming along the Camp street track from the northward, until he got near enough to Camp street to look by the fence; that a house stood on the street line on the left-hand side or southeast corner; that the east sidewalk on Camp street was 12 feet wide, and that it was 12 feet from the curbstone to the east rail of the track. The plaintiff in his direct examination described the occurrence of the accident substantially in this wise: "I was driving along on Lippitt street on the east side of Camp street, and as I reached the corner of Lippitt and Camp streets I turned my head to my right just to look out for the car up Camp street. At that time my horse was very close to the track. In the meantime I looked to the left, and there was no bell ringing; I never heard it. At that time the horse got struck by an electric car, which ran very fast, and dragged the horse along, throwing us out. That is as far as I remember about the accident." It also appeared that when the plaintiff first saw the car it must have been about 30 feet off, and that the horse was probably two feet from the track; that after he saw the car he jerked the reins up, in order to draw the horse back and avoid an accident; that the car was running at such a speed he did not have enough time to cross the track, and so he pulled his horse back, but it was too late. In cross-examination the plaintiff swore as follows: "Q. When you got to Lippitt street, you were coming down there, you say, on a jog trot? A. Yes, sir. Q. You trotted all the way down Lippitt street until the horse was hit? A. Yes, sir. Q. When you got down to Lippitt street you kept going right along, and you looked up over the fence when you went along, and saw that no car was coming down on the right-hand side? A. I didn't look over the fence; I was on the side of the fence. Q. I don't understand you. You had got down so you looked past the fence? A. No; not past the fence, I looked down the street. Q. You didn't look over the fence? A. No. Q. You waited until you got by the fence, and turned your head? A. Yes, sir. Q. And immediately you turned and looked up to the left you were hit,—when you looked to the left, the car was upon you. I understand you to say the accident was inevitable then, and neither of you could get

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away; that is right? A. I guess you heard my statement before. Q. That is the statement you made before, is it not? A. Yes, sir. Q. Let me repeat that. When you got by the corner of the fence, you were quite a way by the corner of the fence when you looked up? A. I was between the fence and the track. Q. When you looked up? A. Yes, sir. Q. Your horse was going all the time when you looked to the right, and didn't see the car coming down? A. No, sir. Q. You looked to the left then, and your horse was going all the time? A. No; when I looked to the right the horse was going, but when I looked to the left I jerked him up. Q. When you looked to the right your horse was going, and when you looked to the left the car was upon you? A. Yes, sir. Q. How near to you? A. Very close. Q. So close an accident was inevitable? A. Yes, sir. \* \* \* Q. In other words, you were in a position where you had got to be hit, wasn't it, no doubt about that? A. In a position I had to be hit. In that position I was. Q. You were; a turn in either direction would have hit you, you couldn't turn to the right or to the left? A. No, sir. Q. Nothing for you to do but to be hit under those circumstances? A. Yes, sir. \* \* \* Q. When you first discovered the car, where was your horse's head? A. Close to the track. Q. How close? A. About two feet. Q. He was trotting? A. He was going slow then. Q. Going right straight along, you say, until you saw the car? A. Yes, sir. Q. Then you held him in? A. Yes, sir. Q. He was going the same rate right straight along until you saw the car and held him in? A. Yes, sir. Q. Where was your horse hit,—where? A. Right on the hip." Mrs. Beerman testified that the car was about half a yard away from the wagon when she first saw it. When the plaintiff rested his case the court nonsuited him on the defendant's motion, and the question is, was the nonsuit well granted? As the ordinances of the city of Providence provide that every person having the control of the speed of a street railway car shall keep a vigilant watch for all teams, carriages, and persons,—especially children,—either on the track, or moving in the direction of the track, and shall strike a bell several times in quick succession on approaching any such team, carriage, or person, or any cross or intersecting street (Ord. of Prov. 1899, c. 43, § 1, par. iv, p. 125); and, as the evidence tended to show that no bell was struck, we shall assume that the defendant was guilty of negligence. So the question arises, was the plaintiff guilty of contributory negligence? Inasmuch as this case involves the relative rights and duties of those entitled to the use and enjoyment of the public streets, it is a matter of importance which user is entitled to precedence of use at a given time, where two desire to use the same place at the same time. In the case at bar, a one-horse carriage, going at a slow pace, so slow that it could be stopped within a distance of a very few feet, and a heavy electric street car, authorized to go

over the street in question at a speed not faster than nine miles an hour, collide when approaching one another through intersecting streets. Both car and carriage are entitled to use the streets, but the different purposes for which they are designed place them under very unequal conditions. The car is designed to serve a quasi public use as a carrier of passengers in large numbers per car, and for that reason it is necessarily large and cumbersome. It is also allowed, in serving the public requirements, to go at a high speed, and hence it is permitted to travel in grooves or on tracks to aid its speed by lessening friction, and affording a smooth, easy path. Its speed is allowed to greatly exceed that of an ordinary carriage, as by law it may traverse Camp street at a rate not faster than nine miles an hour (Ord. of Prov. 1899, c. 43, § 1, par. 1, p. 125), whereas an ordinary carriage is not allowed by law to be driven faster than a common traveling pace (Pub. Laws, Nov. 26, 1901, c. 925, § 1). Its running in grooves or on a track imposes certain limitations upon it that an ordinary carriage does not labor under, viz., its being confined to the line of the track, and not being able to depart therefrom.

1. A railroad track, whether steam or electric, is a place of danger, and a person crossing it, whether on foot or in a vehicle, must exercise ordinary care for his own safety to exonerate him from the charge of contributory negligence, and what is ordinary care under one set of circumstances might amount to negligence under a different set of circumstances. Ordinary care is such care as a person of ordinary prudence exercises under the circumstances of the danger to be apprehended. The greater the danger the higher the degree of care required to constitute ordinary care, the absence of which is negligence. It is a question of degree only. The kind is precisely the same. *Young v. Railroad Co.*, 148 Ind. 54, 58, 47 N. E. 142; *Prue v. Railroad Co.*, 18 R. I. 360, 369, 27 Atl. 450. In *McGee v. Railway Co.*, 102 Mich. 107, 115, 60 N. W. 295, 26 L. R. A. 300, 47 Am. St. Rep. 507, the court said: "We see no more reason for applying the rule that one must look and listen before crossing the tracks of a steam railway than that one must look and listen before crossing a street car track upon which the motive power is electricity or the cable. In this state it is well settled that persons passing over railroad crossings must exercise care. They must look and listen, and, under certain circumstances, must stop, before attempting the crossing. Electric street car crossings are also places of danger. The cars are run at a great speed on this street in question. The city ordinance permits it, and the rule must be that, before going upon such tracks, every person is bound to look and listen. If the view is unobstructed, and the pedestrian takes this precaution, there is not much opportunity for him to be injured. It will not do to say that he has discharged his responsibility in case of an

accident by looking when some feet away, for he may miscalculate the distance and the speed of the car. To avoid danger he must look just before he enters upon the track." In *Blakeslee v. Railway Co.*, 105 Mich. 462, 465, 63 N. E. 401, which was a case of collision between an electric car and a vehicle, the court used this language: "The use of electric cars involves, as it was intended it should, rapid transit. More or less time is required to stop them. They have the right of way within reasonable bounds, and other travelers by ordinary methods owe the duty of making way for them without unnecessary or unreasonable delay. Of necessity, ordinary vehicles must be permitted to drive upon and cross the tracks when the cars are at a reasonably safe distance, and the railway company is in duty bound to keep a sharp lookout, and use prompt measures to prevent accidents when danger threatens. But persons should not pass upon a track without using some precaution to ascertain whether danger is imminent. The case of *McGee v. Railway Co.*, 102 Mich. 107, 60 N. W. 293, 26 L. R. A. 300, 47 Am. St. Rep. 507, is a case in point. In that case a pedestrian looked in one direction, but not in the other, before stepping upon the track, when by doing so he would have seen the lights of the approaching car. In the more recent case of *Fritz v. Railway Co.*, 105 Mich. 50, 62 N. W. 1007, it was held that one riding in a covered carriage, and thereby prevented from looking behind, could not recover against the street car company when he turned suddenly upon the track in front of a car, and was injured. From these cases it appears that it is negligent to go upon a track without taking some precautions to ascertain whether it is safe, and that a person cannot avoid this by placing himself in a position where he cannot easily see an approaching car. The plaintiff did this thing, and if the car was so close that it can be said to have been an imprudent thing to do, if ordinarily prudent persons, knowing the whereabouts of the car, would not have thus turned upon the track, his act was negligent, and should preclude a recovery, if it contributed to the injury." In *Carson v. Railway Co.*, 147 Pa. 219, 224, 23 Atl. 369, 15 L. R. A. 257, 30 Am. St. Rep. 727, the court said: "The street railway has become a business necessity in all great cities. Greater and better facilities and a higher rate of speed are being constantly demanded. The movement of cars by cable or electricity along crowded streets is attended with danger, and renders a higher measure of care necessary, both on the part of the street railways, and those using the streets in the ordinary manner. It is the duty of the railway companies to be watchful and attentive, and to use all reasonable precautions to give notice of their approach to crossings and places of danger. Their failure to exercise the care which the rate of speed and the condition of the street demand is negligence. On the other hand, new appliances, rendered necessary by the advance

in business and population in a given city, impose new duties on the public. The street railway company has a right to the use of its track, subject to the right of crossing by the public at street intersections; and one approaching such a place of crossing must take notice of it, and exercise a reasonable measure of care to avoid contact with a moving car. It may not be necessary to stop on approaching such a crossing, for the rate of speed of the most rapid of these surface cars is ordinarily from six to nine miles per hour; but it is necessary to look before driving upon the track. If, by looking, the plaintiff could have seen, and so avoided an approaching train, and this appears from his own evidence, he may be properly nonsuited. *Marland v. Railroad Co.*, 123 Pa. 487, 16 Atl. 624, 10 Am. St. Rep. 541. It is in vain for a man to say he looked and listened who walks directly in front of a moving locomotive. An injury so received is due to his own gross carelessness. *Railroad Co. v. Bell*, 122 Pa. 58, 15 Atl. 561; *Moore v. Railroad Co.*, 108 Pa. 349. Orr testifies that he knew the crossing, that he listened for the sound of a gong, but, not hearing it, drove on the track, and was instantly struck. He drove in front of a moving car so near to him as to make a collision inevitable. If he had looked, he could have seen the car and stopped, and the accident would have been avoided. Not to do so was, in the language of *Railroad Co. v. Bell*, 'gross negligence,' and justly defeats the action brought to recover from another damages that were self-inflicted. It is the duty of one about to cross a street railway track to look, so that he may not walk directly in front of a moving car, to be struck by it." In *Ward v. Railway Co.* (Sup.) 17 N. Y. Supp. 427, it appeared that the plaintiff's intestate was fatally injured while attempting to drive across a street railway track. There was evidence that, at any time before reaching the track, the deceased, by a glance, could have informed himself of the approach of the car, but that he drove onto the track without looking in either direction. It was held that he was guilty of contributory negligence. See, also, *Ehrisman v. Railway Co.* (Pa.) 24 Atl. 596, 17 L. R. A. 448; *Warren v. Railway Co.* (Me.) 49 Atl. 609; *Everett v. Railway Co.*, 115 Cal. 105, 124, 42 Pac. 207, 46 Pac. 889, 34 L. R. A. 350; *Cawley v. Railway Co.*, 101 Wis. 145, 77 N. W. 179; *Booth*, St. Ry. Law, § 315.

2. Inasmuch as the carriage reached the car track at the intersection of Camp and Lippitt streets before the car did, and inasmuch as cars are frequently in sight when one wishes to cross a track, the question arises as to the relative rights of way between car and carriage. We think the rule laid down by the supreme court of New Jersey in *Railway Co. v. Miller*, 59 N. J. Law, 423, 36 Atl. 885, 39 Atl. 645, is the proper one, and it is as follows, viz.: "The driver [of a carriage] would have the right of way if, proceeding at a rate of speed which, under the circumstances of the time and locality,



was reasonable, he should reach the point of crossing in time to safely go upon the tracks in advance of the approaching car, the latter being sufficiently distant to be checked, and, if need be, stopped, before it should reach him." The law as laid down in the cases before referred to appears to us to be sound, and, applying those principles to the case at bar, we think that when the plaintiff approached the intersection of the streets referred to, he was required to do for his own safety and protection what ordinarily careful persons are accustomed to do under like circumstances. The exercise of ordinary care and prudence required him to look and listen for the approaching car before attempting to cross the track, and his failure to do so would be the result of his own thoughtless inattention, and must be regarded as negligence on his part. When the plaintiff in the case at bar came down Lippitt street towards Camp street, he swore he heard no bell, and though a car makes a loud whirr or noise ordinarily on an up grade, and it was an up grade and a very quiet place there, he heard no sound of an approaching car. He was driving very slowly, so that he could easily have stopped within a very short distance, almost instantaneously. On the other hand, the defendant's car, according to the evidence, was going rapidly, exactly how rapidly does not appear, but if it was going up to its legal limit of speed, viz., nine miles per hour, then it would have been going at the rate of 13 1-5 feet per second, or 792 feet per minute.

3. Whatever the fault of the motorman, it was the duty of the plaintiff to have looked both ways and to have listened before attempting to cross the track, and to have done so immediately before crossing the track. He was on the right-hand or north side of Lippitt street approaching Camp street, and, so to speak, was under the shadow of a high board fence, obscuring his view to the right or northward up Camp street, until he reached the line of Camp street, and his thoughts seem to have been concentrated on looking to the right for a car which was not there, while he paid little or no attention to the left, or to any approaching danger from the south. Being on the right-hand side of Lippitt street, he had a better chance to look to the left or south down Camp street, and in any event he could have looked north or south for a long straight distance up or down Camp street when he got within 24 feet of the car track, within which distance he could have stopped his carriage several times, had he been so disposed, and a glance of the eye, taking less than a second, would have sufficed to have informed him of the rapidly approaching car from the south laden with danger for him. It is idle for him to say that he looked to the south, as, had he done so, he could not have failed to see the car, for there was no obstruction to prevent his seeing while still far enough from the track to allow him to pull up and make his escape effective. But he kept on without abatement of speed until collision was in-

evitable. As said in *Cones v. Railway Co.*, 114 Ind. 328, 330, 16 N. E. 638: "The law will assume that he actually saw what he could have seen if he had looked, and heard what he could have heard if he had listened." Under these circumstances, the language of this court in *Nicholas v. Peck*, 20 R. I. 533, 40 Atl. 418, is applicable: "Though ordinarily the question of contributory negligence is for the jury, we think the plaintiff's negligence is sufficiently clear for the court to hold that he was negligent as a matter of law."

Nothing hereinbefore contained is intended to authorize any inference that a street car is entitled to the exclusive use of the part of a street occupied by its track either at the intersection of streets or elsewhere in a public highway in this state. Pedestrians, vehicles, and cars all have their relative rights in the highways, adapted to the peculiar uses to which each class is allowed to put them, and the general rule is applicable to all that the greater the danger to be apprehended the higher is the degree of care required. A pedestrian using the sidewalk of a city street is not required to exercise so high a degree of care as he would be required to exercise should he attempt to cross from one side of the street to the other; for, then, before crossing, it would be incumbent upon him to glance up and down the street, to see that he was not stepping in front of an approaching horse and carriage, going at a speed that would cause collision and probable injury. So, if the pedestrian was crossing the intersection of a railroad track and a highway at grade, he would be required to look and listen, and if looking and listening, owing to the peculiar surroundings of the place, or other peculiarities,—like a raging snowstorm, etc.,—might be ineffectual, then he would be required to stop, that he might the better look and listen. As we have hereinbefore stated, the degree of care required depends upon the degree of danger to be apprehended. One using a vehicle must use due care no less than a pedestrian, and the same is true of the motorman of an electric car, if each would be free from negligence. The phrase "look and listen," used in the books, is simply synonymous with using one's senses to inform the mind of danger that, being liable to threaten, must be guarded against. Thus, as said by this court in *Ormsbee v. Railroad Corp.*, 14 R. I. 103, 51 Am. Rep. 354: "That ordinary prudence requires one who enters upon as dangerous a place as a railroad crossing to use his senses, to listen, to look, or to take some precaution for the purpose of ascertaining whether he may cross in safety, is an established rule both of law and experience." Though the case of *Carson v. Railroad Co.*, supra, seems to lay stress upon the relative rights and duties at electric car crossings at intersections of streets, yet that is because, in that particular case, the accident occurred at such a crossing; and no inference, in our opinion, can properly be drawn, from its nonreference to the rights of vehicles at

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other places, that no such rights exist. In *Blakeslee v. Railway Co.*, supra, the collision was not at a street intersection, and the car was coming behind the vehicle, when the latter turned suddenly upon the track before the latter car could be stopped, and thus caused the collision. In *Golrick v. Railroad Co.*, 20 R. I. 128, 37 Atl. 635, this court said: "If it be conceded that the railroad company has a paramount right to use that portion of the street occupied by its track, since its cars are necessarily confined to its rails, and cannot turn to the right or left, the public nevertheless also have the right to use the street, including the portion occupied by the track; and it is incumbent on the railroad company, notwithstanding its paramount right, to exercise due care in the operation of its cars not to injure those who may be traveling on the street." In *Winter v. Harris*, 23 R. I. 47, 49 Atl. 398, this court held that, under certain circumstances, it was the duty of the driver of a vehicle to use an electric street car track when there was no danger of colliding with an approaching car.

In the opinion of the court, the plaintiff's petition for a new trial must be denied, and the case is remitted to the common pleas division, with direction to enter judgment for the defendant for costs.

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(*Supreme Court of Michigan, Dec. 2, 1902.*)

[92 N. W. Rep. 349.]

**Accident on Track—Instruction—Evidence.\***

In an action for the death of plaintiff's intestate, from injuries received while riding a bicycle alongside a street car track, the evidence showed that decedent, who was deaf, was signaled by his companions, and warned of the danger from an approaching car, but that he did not understand the signal. There was testimony that the motorman noticed that these signals were not observed by decedent: *held*, that an instruction was justified, holding the company liable if the motorman was negligent in the management of his car, in view of the position and behavior of decedent.

**Same—Negligence of Motorman.**

Where one who was riding a bicycle in dangerous proximity to a street railway track, and in plain view of the motorman of an electric car coming behind, apparently paid no attention to the car, and finally attempted to cross the track, in doing which he was overtaken and killed, the fact that the accident occurred while he was crossing the track will not, in view of the decedent's previous position and behavior, excuse negligence by the motorman in the management of the car.

Error to circuit court, Washtenaw county; Edward D. Kinne, Judge.

Action by Aretus A. Bedell, as administrator, against the Detroit, Ypsilanti & Ann Arbor Railway. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

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\*See note appended to *Cottrell v. Southern Ry. Co.* (Miss.), 2 R. R. R. 641, 25 Am. & Eng. R. Cas., N. S., 641.

Bedell v. Detroit, Y. & A. A. Ry

Corliss, Andrus, Leete & Joslyn, for appellant.

A. J. Sawyer & Son, for appellee.

MONTGOMERY, J. This is an action for negligent injury, and the case may be described and the law laid down by the court understood best by an extract from the charge of the court, as follows: "The case here is not one arising upon a street crossing, which has been a very fruitful source of litigation, but the situation is one where the decedent was riding upon his wheel in the public highway, close beside the defendant's railway, and was overtaken and killed by a car coming from behind. It is sometimes said, very correctly, that, if one discovers another to have been negligent, he must take precautions accordingly, omitting which, he is liable to the other for the damages which follow from his own want of care, for, however related the separate negligences may be, the one cannot bar an action for the other, unless it be contributory; and, though an unseen position might contribute to an accident, a discovered one cannot. The decedent, Mr. Bedell, was not a trespasser upon the street car tracks, in any sense. The right of the street railway in the street is only to use it in common with the public. It has no exclusive right of travel, even upon its track, and it is bound to use the same care in preventing a collision as the driver of a wagon, or any person crossing or entering upon the highway. Street cars have precedence, necessarily, in the portion of the way designated for their use. This superior right must be exercised, however, with proper caution, and a due regard for the rights of others; and the fact that it has a prescribed route does not alter the duty of the defendant railway company to the public, who have the right to travel upon its track until they are overtaken by its cars. In this case there is no dispute but that the motorman saw the decedent, Mr. Bedell, for some time and for a considerable distance before he overtook and struck him with the car. It is undisputed that the motorman saw the decedent riding upon his wheel along a path in very close proximity to the track of the railway company. It is in dispute, however, whether the bell or gong was rung by the motorman. The motorman himself testifies that the decedent gave no indication that he heard the bell or gong of the rapidly approaching car until it was too late to escape disaster. Applying some of these principles to the facts in this case, I instruct you that if the decedent, Mr. Bedell, by reason of being upon his wheel, with his back to the approaching car, and apparently giving no indication of any knowledge of the warning given him by the motorman, was manifestly in a place of imminent danger when and as seen by the motorman, then it became the duty of the motorman to run his car with corresponding care, and in a manner reasonably safe under those circumstances, both as to speed and as to the control of his car; and if, under these circumstances and such duty, the motorman intentionally ran his car, or recklessly or

wantonly allowed his car to be run, at what he knew was a high and dangerous rate of speed, and in reckless disregard of safety and the consequences to the decedent, although with no thought or intention to injure any one, and if, by reason of such reckless and wanton conduct on the part of the motorman, the decedent, Mr. Bedell, was struck and killed, then I think that the railway company was to blame, and that the defendant is liable in this action for whatever damages plaintiff received. If the decedent, Mr. Bedell, was not in a place of danger, as seen by the motorman, then the defendant would not be liable. If the car was not running at a high rate of speed, which the motorman knew, and a reasonable man ought to have known, to be dangerous and improper under the circumstances, then the defendant would not be liable. If the railway company, through its servants, was not wanton or reckless, under the circumstances, it is not liable. Whether or not the railway company is liable, you are to determine from the evidence. In other words, you are to determine from the evidence whether or not the plaintiff has shown by a fair preponderance of the evidence that under the facts and circumstances known and apparent to the motorman, and in view of the situation as it appeared to him, this car was run at a high and dangerous rate of speed, with reckless and wanton disregard of consequences, and whether or not this accident was caused thereby. If these things have not been so shown, the defendant is not liable. If they have not been established, then the defendant is not liable. If you find from the evidence that no bell or gong was rung or sounded, this would be an act of negligence on the part of the defendant company. If you should find from the evidence that the motorman was aware that the decedent, Mr. Bedell, was deaf, and knew that the person riding upon the wheel in front of the car was Mr. Bedell, this knowledge would impose upon the motorman the duty of greater care and caution in the movement and control and handling of his car." These instructions embodied the law as established by previous rulings of this court. See *Montgomery v. Railway Co.*, 103 Mich. 60, 61 N. W. 543, 29 L. R. A. 287; *Tunison v. Weadock*, 8 Detroit Leg. N. 1183, 89 N. W. 703, and cases cited.

The only question which can fairly be made upon this record is whether the facts justified the submission of the question to the jury in the form adopted by the circuit judge. It is contended by the defendant that the evidence shows that the decedent was signaled by his companions, and warned of the danger. This is doubtless true, but it is also apparent that the decedent did not understand the signals given, and there was testimony from which the jury might have inferred that the motorman observed that these signals were not being understood or observed by decedent.

The defendant also contends that the case is one like *Fritz v. Railway Co.*, 105 Mich. 50, 62 N. W. 1007, namely, an



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attempt to cross the track, unexpected and sudden. But the present case differs from that in this; that for a considerable distance the decedent, while pursuing his way on his bicycle, ahead of and in the same direction in which the electric car was going, was near enough to the track to be in a place of danger; and this within the observation of the motorman. There was testimony, therefore, bringing the case within the rule of the cases first above cited, and, as the only error relied upon is the refusal of the circuit judge to direct a verdict for the defendant, the judgment will be affirmed. The other justices concurred.

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STATE *ex rel.* CITY OF DULUTH *v.* DULUTH ST. RY. CO.

(*Supreme Court of Minnesota, Dec. 26, 1902.*)

[92 N. W. Rep. 516.]

**Street Railroads—Franchise—Construction—Duty to Build Lines.**

A village ordinance required a street railway company, in consideration of the franchise thereby granted, to build lines of railway upon certain streets on or before a day certain, provided that such streets were graded by the village 60 days prior thereto: *held*, the proviso was inserted for the benefit of the railway company, and it was not released from its obligation by the mere fact that such streets were not graded within the time stated: *held*, further, that the village, or its successor, was not guilty of laches in not requiring the construction of the lines until nine years after the passage of the ordinance.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; Homer B. Dibbell, Judge.

Application by the state, on the relation of the city of Duluth, for writ of mandamus to the Duluth Street Railway Company. From a judgment for relator, defendant appeals. Affirmed.

Greene & Wood, for appellant.

Oscar Mitchell, for respondent.

LEWIS, J. On July 13, 1891, the village of West Duluth, afterwards incorporated into the city of Duluth, the relator in this action, passed an ordinance granting appellant the exclusive right and privilege to construct and operate street railways in the streets of the village of West Duluth, subject to certain terms, conditions, and forfeitures in the ordinance contained. That part of the ordinance bearing upon the question before us is as follows:

“Sec. 3. New Lines and Extensions. Forfeiture. The village council may at any time designate any line of railway in the said village as a line demanded by the public necessity and may also designate an extension of any line or lines then existing, and in case said company upon being notified of such designation, shall not within such reasonable time as shall be fixed by the village council, not less than six (6)

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months, construct and put in operation such line, then said company shall forfeit its said exclusive right and the village council may charter to any other company the exclusive right to construct and operate a street railway upon the streets or lines of extension so designated." "Sec. 18. Streets, etc., on Which Lines Shall be Built. To be Completed When. The streets over which said line is to be built and the time within which the same is to be constructed as provided herein, are as follows: A line on Sutphin street to First street; thence on First street to Fourth street north; thence on Fourth street north to Central avenue; thence on Central avenue to Second street south; thence on Second street south to Seventh avenue west (also called Madison avenue); which said line shall be completed and in operation on or before the first day of October, A. D. 1891. A line on Grand avenue eastward from Fifth avenue west in said village to a point connecting said line with the street railway system of said company in the city of Duluth, which said last mentioned line shall be completed and in operation on or before the first day of July, 1892, so that cars over said Grand avenue line shall be running between said village of West Duluth and the city of Duluth aforesaid on or before said last mentioned date of July 1, 1892. Provided that the streets on which the same passes shall have been graded sixty (60) days prior thereto."

Appellant built the Sutphin street line as provided, but did not construct the Grand avenue line, and on September 3, 1901, the common council of relator city passed a resolution ordering and requiring appellant to extend its West Third street line from Fortieth avenue west to Sixtieth avenue west, being the remainder of the line necessary to construct on Grand avenue, as required by the ordinance. Appellant having failed to comply with the resolution, this action was brought for the purpose of compelling it to do so. The defense, in part, was upon the ground that until October 26, 1894, that part of Grand avenue which crossed private property, known as the "Wheeler Tract," was not graded or dedicated to the public as a street, for which reason that line was not constructed in the time required by the ordinance; also that such line did not run through the improved and inhabited part of the city, and hence that it was not necessary for the accommodation of the public. The court found that the street was graded and opened to public travel through the private tract by the owner of the property more than 60 days prior to July 1, 1892, but that no right of way had been acquired by the city until by deed of date October 26, 1894. The court also found that during the year 1896 appellant constructed its line of railway westerly on Grand avenue as far as Fortieth avenue west, and that public necessity required the completion of the line in question, viz., from Sixtieth avenue west to Fortieth avenue west, and judgment was ordered accordingly. This appeal is presented simply upon

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the findings of the court as to whether they justified the judgment. Appellant argues that from a fair and reasonable construction of section 18 of the ordinance it was intended by the parties that the proviso was not confined to the particular time within which the line should be constructed; that, if any part of Grand avenue over which the line was to be extended should not be graded within 60 days prior to July 1, 1892, then appellant was absolved from its obligation to at any time construct such line; that the street was not graded or opened within the meaning of the ordinance by the simple fact that the owner of the Wheeler tract had himself graded and opened the street to public travel; that the streets and avenues referred to in the ordinance contemplated that they were to be streets and avenues which had been properly dedicated and permanently opened, and in and to which the village had acquired actual title. Again, that, if the court should hold that the proviso was limited only to the time of construction, and not to the right of construction, or that the private grading by the owner of the Wheeler tract would have the same effect as though the right of way had been acquired by the village, then relator is not entitled to relief, for the reason that it had been guilty of laches. Appellant further urges that relator has not pursued the right remedy, and is not entitled to the writ of mandamus, for the reason that the contract between the parties, as set forth in section 3 of the ordinance, provides another and adequate remedy, which is conclusive between the parties.

1. It is very clear that the proviso as to the grading of the street within 60 days has reference to the time of construction, and was inserted for appellant's benefit, in order that it might not be required to build any part of its line at any time unless the village should have made at least 60 days' preparation therefor by grading its streets. That this is the correct interpretation is evident not only from the natural meaning of the words comprising the proviso, but also from the fact that the village had granted a valuable franchise for the period of 40 years, and the only consideration upon which it was issued was that the company should extend its railway service as the public necessity required, and that it should construct two principal lines of railway connecting the then village with the city of Duluth, which was some five or six miles distant. It is evident that the village authorities had in mind not only the future control and regulation of the railway lines for the benefit of its inhabitants, but also that it should accomplish the immediate purpose of furnishing its citizens with transportation by means of the two lines mentioned in the ordinance. It is not reasonable that the village would thus explicitly provide for the accommodation of its citizens, and then surrender all, contingent upon such a condition. If it was the intention to limit the requirement to the road to the time stated in the proviso, definite lan-

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guage would have been used directed clearly to the point.

2. Assuming that the street over the Wheeler tract had not been acquired by the public 60 days prior to July 1, 1892, so as to authorize the railway company to extend its line over that part of Grand avenue, and that such right of way was not acquired until October 26, 1894, we do not think relator guilty of laches in failing to take action to compel the building of the line until September 1, 1901. The circumstances were sufficient to excuse such delay, and appellant is not in a position to take any advantage thereof. In the first place, until 1896 appellant had not constructed its line from the main part of the city of Duluth westerly, and in the natural course of developing its railway system it was not prepared to extend the line over the Wheeler tract. In the next place, from 1896 to 1899 the company was in the hands of a receiver, and presumably was not prepared, financially or otherwise, to make such an extension. It does not appear that appellant relied upon the fact of such delay by changing its plans, or extending some other line which would better accommodate the inhabitants of that part of the city. The duty imposed upon the company by the ordinance was a positive obligation, entered into by it in consideration of the granting of the franchise. It was not relieved of such duty by the mere fact that the public authorities had not before seen fit to exact its execution. Evidently the delay was by mutual consent, and for the benefit of the company.

3. We do not think the third section of the ordinance has any bearing upon the question before us. It has particular reference to the extending of lines otherwise than those mentioned in section 18, and it is not necessary for us to enter into a discussion as to the respective rights of the parties under that section.

Judgment affirmed.

PUTNAM *et al.* v. BOSTON & P. R. CORP. *et al.*

(*Supreme Judicial Court of Massachusetts, Suffolk, Jan. 5, 1903.*)

[65 N. E. Rep. 790.]

**Change of Grade of Street—Injury to Nonabutting Property—Damages.**

Pub. St. c. 112, § 95, providing that a railroad company "shall pay all damages occasioned by laying out, making and maintaining its road or by taking land or materials therefor," requires a railroad company changing the grade of a portion of a street to pay damages for the special and peculiar injury to an owner of property abutting on the street thereby occasioned, though no part of such property abuts on the portion of the street the grade of which is so changed.

**Same—Special Injury.**

The fact that the change of the grade made the use of the street by a property owner on another part of the street less convenient and easy for travel does not show special and peculiar injury to him, entitling him to damages, though he has no communication with other streets except by passing over the changed grade.

**Putnam v. Boston & P. R. Corp****Same—Damages.**

A railroad company, in making a change in the grade of a street, completely closed up, for a period of several months, access to and egress from the property of an owner of land abutting on another part of the street, such owner had no means of access to other streets, and was deprived of the use of his property: *held*, that the abutting property owner was entitled to the damages thereby sustained.

Report from superior court, Suffolk county; Franklin G. Fessenden, Judge.

Petition by Putnam and others against the Boston & Providence Railroad Corporation and others for the assessment of damages occasioned by a change of the grade of a street. Case reported. New trial ordered.

Chas. S. Hamlin and Jas. H. Knight, for petitioners.

J. H. Benton, Jr., for defendants.

KNOWLTON, C. J. The petitioners are the owners of 22,300 square feet of land, with a wharf and a dock and buildings upon it, abutting about 75 feet on Lehigh street, which originally extended from South street to Albany street, in Boston. Previously to the change in the street to which this petition relates, the easterly portion of Lehigh street had been discontinued, under the provisions of St. 1896, c. 516, which provided for the construction of the terminal railway station in Boston. This discontinuance extended nearly to the easterly boundary line of the petitioners' premises, and left the street with a length of only about 230 feet between that point and Albany street. Under the authority of this statute the Boston & Providence Railroad Corporation filed a location for the extension of its railroad from Dartmouth street to the terminal company's ground, and this location made necessary a change of grade of Albany street, and also of Lehigh street, for a distance of about 132 feet from Albany street to a point about 25 feet from the westerly line of the petitioners' premises. This change was made, and the location of the railroad was filed in accordance with an order of the board of aldermen, and this petition is brought to recover damages to the petitioners' property from the change of grade in the street. This property is left in a cul-de-sac, with the only access to it through Albany street, and for a distance of 160 feet over Lehigh street. The auditor passed upon two questions: First, "Whether, in the case of property not abutting on the changed grade, damages for a special and peculiar injury can be recovered;" secondly, "Whether in the present case the injury to the petitioners' property is of such special and peculiar nature as to entitle them to damages."

The first of these questions he rightly answered in the affirmative. The statute provides that the railroad company "shall pay all damages occasioned by laying out, making and maintaining its road or by taking land or materials therefor."



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Pub. St. c. 112, § 95. See, also, Pub. St. c. 49, § 16; *Marsden v. City of Cambridge*, 114 Mass. 490; *Dana v. City of Boston*, 170 Mass. 593, 49 N. E. 1013; *Sheldon v. Railroad Co.*, 172 Mass. 180, 51 N. E. 1078. So far as the permanent effect upon the property is concerned, the auditor rightly found that the damages, upon the evidence offered, were not special and peculiar. The change of grade made the public street less convenient and easy for travel with teams than it had been before. This change was very near the petitioners' property, and, in connection with the occupation and use of that property, the inconvenience of it would be felt in much greater degree by the petitioners than by persons who would have occasion to use the street only infrequently. But the use in either case is only that of one of the public traveling in the street, and the inconvenience and damage to property owners in the vicinity, although greater in degree, is the same in kind, as to those living a long way off. It has been settled by many decisions in this commonwealth that this damage is not special and peculiar, and cannot be allowed in a proceeding of this kind. *Proprietors of Locks & Canals v. Nashua & L. R. Corp.*, 10 Cush. 385; *Smith v. City of Boston*, 7 Cush. 254, 19 Am. & Eng. R. Cas., N. S., 320; *Willard v. City of Cambridge*, 3 Allen, 374; *Fall River Iron Works Co. v. Old Colony & F. R. Co.*, 5 Allen, 221; *Blackwell v. Railroad Co.*, 122 Mass. 1; *Davis v. County Com'rs*, 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750; *Hammond v. County Com'rs*, 154 Mass. 509, 28 N. E. 902; *Shaw v. Railroad Co.*, 159 Mass. 597, 35 N. E. 92; *Nichols v. Inhabitants of Richmond*, 162 Mass. 170, 38 N. E. 501; *Davenport v. Inhabitants of Dedham*, 178 Mass. 382, 59 N. E. 1029. On this question, the fact that the petitioners' land has no communication with other parts of the city, except in one direction, makes no difference. This fact was the same in *Davis v. County Com'rs* and in *Hammond v. County Com'rs*, *ubi supra*.

Another part of the proposed evidence presents a different question. The petitioners offered to prove that, in making the change, Lehigh street, between their property and Albany street, "was completely closed up, and access to and egress from the property of the petitioners for teaming purposes was rendered impossible, from April 21, 1899, to August 21, 1899," and that the petitioners thereby suffered great damage, from their inability to use their property for the purposes to which it was adapted. Although this kind of question has sometimes been referred to, there is no adjudication covering it in this commonwealth. For four months the street was practically, although not technically, discontinued, so far as travel by teams was concerned. This, we understand, was a necessary consequence of changing the grade according to the order. Ordinarily, on discontinuance of a street, only those persons whose property abuts on the part discontinued suffer special and peculiar damages. Commonly such persons are

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the only ones whose property is cut off from access to the world outside. If this access is only made less convenient, by the necessity of using some other part of the highway, instead of the part discontinued, their inconvenience in that particular is of the same kind as that of the public generally. But if their access from their property to the general system of public highways of the city or town is cut off altogether, the case is different. It has repeatedly been recognized that in such a case they may suffer special and peculiar damages. The right to recover such damages, even though the property does not abut on the discontinued portion of the way, is recognized by Chief Justice Shaw in the last paragraph of the opinion in *Smith v. City of Boston*, 7 Cush. 254, and by Mr. Justice Charles Allen in *Davis v. County Com'rs*, 153 Mass. 218-223, 26 N. E. 848, 11 L. R. A. 750. See, also, *Castle v. Berkshire Co.*, 11 Gray, 26; *Stanwood v. City of Malden*, 157 Mass. 17, 18, 31 N. E. 702, 16 L. R. A. 591. It never has been held that one whose access to a general system of public streets in a city or town is entirely cut off suffers only the same kind of damage by the discontinuance of a street as one of the public who is merely obliged to travel further through public streets to reach his destination. So to hold would be to extend too far the doctrine previously stated in this opinion, which, as now established, sometimes causes hardship, although it rests on sound principles and generally accomplishes justice. The cases of *Harvard College v. Stearns*, 15 Gray, 1, and *Blackwell v. Railroad Co.*, 122 Mass. 1, differ so much from the present case in their facts that they are not controlling in favor of the respondent.

If the petitioners had been deprived of access to their property with teams permanently, as they were for four months, we should have no hesitation in holding that their damages were special and peculiar, and that they could recover them under this petition. Does it make any difference in principle that the interference with the use of their property was only temporary? We are of opinion that it does not, and so it has been decided. *Penney v. Com.*, 173 Mass. 507, 53 N. E. 865, 73 Am. St. Rep. 312; *Edmands v. City of Boston*, 108 Mass. 535. It seems likely that the damage was considerable, and, although it did not grow out of a permanent condition, it resulted as directly and as necessarily from the order of the aldermen as if it had been of a permanent character. In proceedings of this kind, all damages that result directly from the action of the public authorities, for which the statute gives damages, are to be included. We know of no adjudication, nor of any sound principle, that precludes the petitioners from recovering such damages as they suffered from the deprivation of access from their property to the public streets as a necessary result of the change ordered by the aldermen. It will seldom happen that the execution of such an order will cut off access in all directions to the public streets of a

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city, which before had been enjoyed as an attribute of the property. When it does happen, in a case in which the statute makes compensation for damages, such damages are recoverable.

In the opinion of a majority of the court, the entry should be: New trial ordered.

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OHIO RIVER JUNCTION R. CO. *v.* FREEDOM & C. ELECTRIC ST. RY. CO.

*(Supreme Court of Pennsylvania, Nov. 4, 1902.)*

[53 Atl. Rep. 773.]

**Railroads—Injunction—Crossing by Street Railway.**

Where a railroad company had located, but not constructed, a branch across a public road, it could sue to enjoin a street railway company from constructing its road across such branch at grade until the rights of the parties at the crossing were adjusted.

Appeal from court of common pleas, Beaver county.

Bill by the Ohio River Junction Railroad Company against the Freedom & Conway Electric Street Railway Company. From an order dissolving a temporary injunction, plaintiff appeals. Reversed.

The plaintiff, a railroad corporation, on March 17, 1900, located a branch line, which crossed the Beaver and Pittsburg state road, and subsequently located another branch crossing the state road in the borough of Freedom. The Beaver Valley Traction Company leased the railway and franchises of the People's Electric Street Railway Company, and under this lease claimed the right to construct a street railway on the state road at the points where the two branches crossed that road. Plaintiff denied the validity of this lease in so far as it gave power to construct a street railway on a country or township road, and also denied that the traction company had secured the local and municipal consent prerequisite to its right to construct its line.

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Richard S. Holt and George Wilson, for appellant.

Arthur E. Barnett and John M. Buchanan, for appellee.

PER CURIAM. The decree is reversed, and it is now ordered that the preliminary injunction granted by the court below be continued until final hearing. In appeals of this character we do not pass upon the merits of the controversy between the parties until after the final determination of the cause by the court below.

**KLOSTERMAN *et al.* v. CHESAPEAKE & O. RY. CO. *et al.***

(*Court of Appeals of Kentucky, Dec. 17, 1902.*)

[71 S. W. Rep. 6.]

**Tracks in Street—Injuries to Abutting Owners—Limitation of Actions.**

Though the right to sue a railway company for damages caused to abutting property by reason of the construction and operation of railway tracks in the street pursuant to legislative and municipal authority is barred after five years, an action for damages arising from the construction and operation of tracks in the street without such authority is barred by the 15-year statute of limitations.

**Same—Authority to Construct and Operate.**

A railway company, by Acts 1885–86, pp. 340, 343, was authorized to construct and operate railroad tracks on or across streets for the purpose of making connections with other railroads in the city, but could not acquire more than one right of way from any depot without giving a week's notice of its intention to make application to the city council for additional privileges. It could purchase the rights of other companies. It requested the city council to approve a selection made by it for its tracks, but no action was taken thereon. Subsequently it purchased the rights of a company having a right of way on a certain street, and having authority to construct one track on other streets of the city. And thereafter it concurrently constructed and operated two tracks in one of such streets: *held*, that but one of the tracks was constructed and operated under legislative and municipal authority.

**Measure of Damages.**

A railroad company concurrently constructed and operated two tracks in a street. It had legislative and municipal authority to construct and operate one track only: *held*, in an action by an abutting owner for damages to his property, brought after the right to sue for damages arising from the construction and operation of the track authorized by law was barred, that the measure of recovery was the damages sustained by reason of the construction and operation of the two tracks, less the damages which would have been caused by the construction and operation of one only.

Burnam, Du Relle, and O'Rear, JJ., dissenting.

Appeal from circuit court, Kenton county.

"To be officially reported."

Action by Angelina Klosterman and others against the Chesapeake & Ohio Railway Company and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Harvey Myers, for appellants.

Simrall & Calvin and C. P. Chenault, for defendant Chesapeake & O. Ry. Co.

J. W. Bryan and E. W. Hines, for defendant Louisville & N. R. Co.

PAYNTER, J. The former opinion of this court, delivered herein by Judge Hobson, is as follows:

"Frank A. Klosterman died on February 10, 1892, the owner of certain real estate in Covington, Kentucky. Appellants are his widow and children, six of the latter being infants. They filed this suit December 5, 1895, against the Chesapeake & Ohio Railway Company, the Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company,

and the Louisville & Nashville Railroad Company, to recover damages in the sum of \$7,000 for alleged injuries to the real estate received by them from the decedent; the widow being executrix of his will, and guardian of his children, and as such joined also in the suit. Issue was joined upon the petition, and on final hearing the court gave the jury a peremptory instruction to find for the appellees.

"Appellants' property is situated at the corner of Lewis and Craig streets. It has on it two brick houses. One is a three-story brick building, situated on the corner, and fronting on both streets. The first story is used as a storeroom for mercantile purposes; the second and third, as a residence. The other is a two-story dwelling fronting on Craig street. There is a small area or yard between the two houses. The railroad tracks complained of run diagonally across Craig and Lewis streets at their intersection. The nearest rail is six and one-half feet from the gutter curb. Inside of the gutter curb is a sidewalk six feet wide. Both the buildings extend out to the sidewalk, so that at the corner the three-story brick house is only about fourteen feet from the nearest rail of the railroad track, or about eleven and one-half feet from the side of the cars when passing. Craig and Lewis streets are each thirty feet wide, including the sidewalk on either side. The railroad at this point is a double track, and is used almost constantly day and night. Before the railroad was built the property rented for forty-two dollars a month. Now it brings scarcely enough to pay taxes and insurance. The trains operated are many of them heavy freights, which jar and shake the houses to such an extent as to alarm the occupants and wake them at night. A large quantity of cinders and smoke is thrown into and upon the property, sometimes filling the front rooms with smoke, and to such an extent that it is impracticable to keep the front windows open at all. Large quantities of cinders fall upon the roof and yard, burning the paint off the roof, causing it to rot, and unfitting the yard for such uses as the yard of a residence is designed for. The wall of the two-story building is settled. The noise, vibration, and discomfort from smoke and cinders are such that only an undesirable class of tenants will rent the property for a residence, and the storeroom is not desirable for a business place. The tracks take up substantially the intersection of the streets, with the exception of six feet on each side, so as in a great degree to interfere with the ingress or egress of wagons and teams, from the fact that trains are passing so often day and night. There is no doubt, under the evidence, that the property is desirably located, and was valuable before the construction of the railroad, and by reason of its construction has been largely unfitted for the purposes for which it was intended, and greatly depreciated in value. The railroad was constructed precisely as it is now in the year 1889, and, the



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action not having been filed within five years thereafter, the appellees interpose the plea of limitation, and it was on this ground that the court below gave the jury a peremptory instruction to find for appellees.

“In *Railroad Co. v. Orr*, 91 Ky. 109, 15 S. W. 8, this court held that a railroad must be regarded as a permanent structure, and, when its construction in the streets of a city is authorized by legislative and municipal authority, all damages naturally resulting from the proper operation of the road can then be ascertained and determined, and the cause of action therefor is barred by limitation after five years from the time the action might first have been instituted. This case has been followed in so many subsequent causes that the question is not now an open one, but we are not inclined to extend the rule beyond the limits thus laid down, or to apply it to a case where the construction of the railroad in the street is not authorized by legislative and municipal authority. As has been held by this court in several cases, and is recognized in section 242 of our present constitution, the injury to property in cases of this character is substantially a taking of private property for public use, and, where this taking has not been done under proper authority of law, it should stand, as to limitation, on the same plane as any other taking of real estate. The structure being permanent, the action is not for a trespass upon the property, in which damages within the preceding five years may be recovered; but the question to be determined is, what will be a fair compensation to the owner of the property for the depreciation of the value of his property by the servitude that is thus placed upon it? When the construction of the railroad is authorized by law, all persons must take notice of this; and there are sound reasons of public policy for not extending the bar of limitation to those cases where the construction is not by authority of law, and the citizen cannot well understand his rights. It remains, therefore, to determine whether the tracks in question were constructed under proper legislative and municipal authority.

“On August 27, 1851, the council of the city of Covington granted to the Covington & Lexington Railroad permission to lay its road in Washington street. The Covington & Lexington Railroad was afterwards succeeded by the Kentucky Central Railroad, and on October 22, 1885, the city council granted to it, its successors or assigns, permission to extend its track from its terminus to a point on or near the Ohio river, and ‘the right of way for a single track over such streets and alleys’ as might be best for said company to use. This grant was, in terms, limited to ‘the right of way for a single track.’ On December 17, 1887, the Kentucky Central Railroad sold and assigned to the Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company all of its rights, privileges, and franchises under and by virtue of these ordinances, and it is insisted that it was justified in constructing

the double track in controversy under this authority. But the original ordinance made in 1851 granted a right of way only on Washington street, and the ordinance of October 22, 1885, in express words, granted only a right of way for a single track. Where the authority is expressly limited to a single track, it cannot by construction be enlarged, for this would be to violate the plain terms of the instrument. Unless, therefore, there was some other authority for building this double track, the case does not fall within the rule laid down in Railroad Co. v. Orr, above referred to.

“Appellees also rely on certain provisions of the charter of the bridge company, and certain sections of the municipal authorities of Covington. These will now be considered: The bridge company was incorporated by an act approved April 4, 1884, under the name of the Covington & Cincinnati Pier Bridge Company. By an act approved February 9, 1886, the name of the corporation was changed to the Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company. This act also contains the following provision (1 Acts 1885–86, pp. 340, 343): ‘Said corporation is hereby authorized and empowered to construct, maintain and operate railroad tracks with necessary turnouts and sidings upon the said bridge and the approach thereto.’ Section 3. ‘The said corporation shall also have power to construct a railway track with necessary turnouts and sidings upon, over, along or across any public streets, roads, alleys, avenues or through or over any blocks or ground between such streets for the purpose of making connection with the depots or railway tracks of any railroad in the city of Covington within such territorial limits as the city council of said city shall prescribe.’ Section 4. ‘The said company shall construct and maintain tracks connecting its bridge with the Kentucky Central Railroad in such manner as to enable other railroads to connect their lines of railway with said tracks approaching said bridge. Connections made by any other railroad with such connecting tracks shall be so made as to admit other roads to connect therewith; and any railroad now existing or to be hereafter constructed within the city of Covington shall have the right to connect its railway with said connecting tracks and shall have the right to use the same for the purpose of and to cross said bridge with its locomotives and cars, upon the payment of toll and upon the terms in this act expressed.’ Section 8. ‘The said company shall not have the power to acquire more than one right of way from any depot in Covington to its bridge and shall obtain no permit or privilege from the city council of Covington for such right of way without first having given at least one week’s notice of its intention to make application therefor, which notice shall be in writing and be served on the city clerk of said city, and said corporation shall also cause said notice to be published in some newspaper circulating in Covington at least seven days

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before the making of such application.' Section 10. The corporation was also authorized by section 6 of the charter to acquire, either by purchase or assignment, such right of way as any other company then possessed or held over or across any streets or blocks of ground in Covington. The only purchase it made was from the Kentucky Central Railroad, as above stated; and, as this was only a right of way for a single track, authority to construct and maintain the double tracks in question must depend upon a compliance on its part with the provisions above quoted from its charter. It was only authorized by the charter to construct its track within such territorial limits as the city council of the city should prescribe. Section 4. It had no power to acquire more than one right of way from any depot to its bridge, and could obtain no permit or privilege from the council without first giving a week's notice by service on the clerk, and publication in a newspaper circulating in the city. Section 10. The record shows that at a meeting of the council on April 22, 1886, the bridge company presented a paper informing the council that it had located the approaches to its bridge from a certain square, running thence northwardly to the Ohio river, and requesting the council to approve the selection; the paper stating that due notice of the application had been given to the city clerk and by publication as required by law. The council thereupon referred the matter to its committee on railroads and bridges, to report, by ordinance or otherwise, when the company presented more specific location of their route. This, so far as the record shows, was never done, and no action was ever taken by the council on the application. The record also shows that at the same meeting of the council, on April 22, 1886, the Kentucky Central Railroad reported to the council its location of its right of way under the ordinance of October 22, 1885, along the route now occupied by the tracks in controversy. The record further shows a prolonged struggle between the city authorities and the railroad companies about their rights of way, and on July 29, 1886, a majority and minority report were presented in regard to the granting of the right of way to the bridge company, but no action appears to have been taken on either report. After this the Kentucky Central deeded to the bridge company its right of way, and it is hard to escape the conclusion that the bridge company, to avoid the terms sought to be imposed upon it by the city, or for some other reason, ceased to prosecute its application to the council, and undertook to get along under its purchase from the Kentucky Central. At least, the presumption must be, as it was only authorized to acquire one right of way, and it did not follow up its application to the council, that this application was abandoned. The purpose of requiring notice to be given of the application was that those interested might resist it before the council, and, when this resistance was made with

such effect that no action was taken on the application, the only reasonable conclusion is that the corporation made some other arrangement. It is also shown in the record that on December 22, 1886, an ordinance was passed allowing the Covington Short Route & Transfer Company to build a line from Licking river to the Kentucky Central track, and that in the year 1889 several ordinances were passed requiring the erection of safety gates and the keeping of flagmen at different points along the tracks in controversy. It is contended for appellants that the council, in doing this, only protected the people of the city, and that such ordinances were not grants of right of way, but only police regulations to prevent the trains from running over people. However this may be, we do not think a grant by implication or acquiescence could be properly made by the city council under section 10 of the charter above quoted, for it contemplates that the persons interested shall have notice of the application, and an opportunity to resist it. To allow a grant to arise from the acquiescence of the council, without notice to those interested, as provided by the statute, would be to defeat its entire purpose.

“We are theretofore of opinion that the construction and operation of the double tracks in front of appellants’ property was not under regular legislative and municipal authority. While there was authority to construct and operate a single track, a double track, running necessarily so close to the property, was a much more grievous burden; and we do not think the statute of limitation should bar any part of the injury done, for the reason that it is an entirety, and not separable. It would mean that after five years the city authorities and the persons interested, having acquiesced in the construction of the railroad, cannot enjoin its operation or require its removal. Appellees, after the expenditures made by them, must be allowed to maintain and operate their road, but if, in so doing, they take the property of appellants, they must make them a fair compensation for the injury done. The road cannot now be treated as an illegal structure, or its operation as a nuisance. All we hold is that limitation of five years does not protect appellees from liability for injury done appellants, as their road was not constructed under proper municipal authority.”

The opinion so well states the facts in the case, the various legislative enactments, the proceedings of the common council of the city of Covington, and the conclusion as to the application of the doctrine of the Orr Case, that it is incorporated in this opinion. The court recedes only from that part of the opinion where it is said, “We do not think the statute of limitation should bar any part of the injury done, for the reason that it is an entirety, and not separable.” Under the doctrine of the Orr Case, the five-year statute of limitation would have barred the appellants’ cause of action,

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had the appellees constructed only a single track, because it was done under the legislative and municipal authority. The appellees did not have municipal authority to construct the additional track. The mere fact that it was constructed at the same time that the authorized one was could not make it a lawfully constructed track. It was as much an additional servitude upon the street, and injury to the property of appellants, as it would have been, had it been constructed anterior or subsequent to the construction of the authorized track. The effect upon the rights of the appellants was just the same whether the authorized track was constructed prior to, at the same time, or subsequent to the construction of the authorized one. The time of the construction could not affect in any way the application of the statute of limitations to the rights of appellants. When the authorized track was constructed, under the Orr Case, the five-year statute of limitation began to run. When the unauthorized one was constructed, and damaged the property of the appellants, it was an unlawful taking of their property, and the fifteen-year statute of limitation applies. As the appellees had the right to maintain one track under legislative and municipal authority, did it forfeit the right to have the five-year statute of limitation apply to appellants' cause of action for injury and damages resulting from its prudent operation? Upon reconsideration, we have concluded that it has not lost it. Its unauthorized act could not change the application of the law of limitation to a cause of action existing independent of such act. If could no more do so, than the doing of the lawful act could change the application of another statute of limitation to the cause of action growing out of the unauthorized act. The construction of two tracks created an additional servitude upon the narrow street, and the operation of trains over both of them necessarily added to the damages to appellants' property. While the construction and operation of the two tracks makes it more difficult to determine the damage resulting to the appellants, than it would if only one had been constructed and operated, still that difficulty, which has been created by appellees, should not be interposed as a barrier to appellants' right to have redress for their wrongs. The damage for which they are entitled to recover from appellees is for constructing and maintaining two tracks instead of one. Whatever damages the appellants sustained by reason of the construction and operation of two tracks, which they would not have sustained by the construction and prudent operation of one track, is the amount of damages appellants are entitled to recover. This we believe to be the correct rule for the measurement of the damages they have sustained, and for which their right to recover is not barred by the statute of limitation.

The judgment is reversed for proceedings consistent with this opinion.

O'REAR, J. (dissenting). This action was brought to



recover damages alleged to have resulted from the operation of railroad trains over appellee's tracks at the intersection of Lewis and Craig streets, in Covington, Ky. The double tracks of appellee's road pass diagonally across the intersection of Lewis and Craig streets, and over these two streets all railroad trains of appellee's road moving between Covington, Ky., and Cincinnati, Ohio, pass. Appellants' property is situated at the southeast corner of Lewis and Craig streets, fronting 35 feet on Lewis street, and extending back 75 feet on Craig street. Upon this lot is a three-story brick house at the corner, and a two-story brick house on the rear of the lot, fronting on Craig street. These tracks were constructed across the intersection of Lewis and Craig streets in the year 1889, since then they have been constantly used in substantially the same condition as they were when first built. At the time of their construction the property involved in this litigation was owned by Frank Klosterman, the husband of one of the appellants, and the father of the others. He died February 10, 1892, and this suit was brought December 5, 1895, by his widow, as executrix, and by his devisees, for injuries to the property arising from the operation of trains on and over said tracks; that is, from the noise, smoke, cinders, and vibrations arising from the operation of the cars. The petition does not allege that appellee's operation of its railroad trains was negligent or unusual, or other than the usual and customary service. Nor does the petition proceed upon the ground that by the construction of appellee's railroad tracks, and the operation of its trains, there has been an interference with appellants' right of egress and ingress from and to their said property. It is the contention of appellants, as set out in this petition, and made here in argument, that appellee's occupancy of the street in question, to the extent of one of its tracks, was without legislative or municipal authority, and it was therefore a continuing nuisance for appellee to operate on such tracks its railroad trains and locomotives. It becomes important, therefore, to determine whether appellee's occupation of the streets in question by its double track of railroad was or has become authorized. If it was, this action is confessedly barred, under the principles announced in *Railroad Co. v. Orr*, 91 Ky. 114, 15 S. W. 8. The tracks were built by appellee, the Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company, hereinafter called the "Bridge Company." This company was incorporated by an act of the legislature approved February 9, 1886. Prior thereto the Kentucky Central Railroad Company had acquired certain corporate rights and franchises, including that of operating and maintaining a line of railroad into the city of Covington, and on to the Ohio river. The bridge company was authorized to construct a railway and highway bridge across the Ohio river between the cities of Cincinnati and Covington, and to operate

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railroad trains thereon. It was authorized to construct approaches to the bridge on the Covington side, and to build and maintain connection with the railroad tracks of such other roads as might then be in Covington, or might thereafter be constructed to Covington. At that time, so far as the record discloses, there was but one road in Covington, to wit, the Kentucky Central. The eighth section of the act of incorporation is as follows: "The said company shall construct and maintain tracks connecting its bridge with the Kentucky Central Railroad in such manner as to enable other railroads to connect these lines of railway with said tracks approaching said bridge. Connections made by any other railroad with such connecting tracks shall be so made as to permit other railroads to connect therewith; and any railroad now existing or to be hereafter constructed within the city of Covington shall have the right to connect its railway with said connecting tracks, and shall have the right to use the same for the purpose of, and to cross said bridge with its locomotives and cars upon the payment of tolls and upon the terms in this act expressed." Section 10 is as follows: "The said company shall not have the power to acquire more than one right of way from any depot in Covington to its bridge, and shall obtain no permit or privilege from the city council of Covington for such right of way without first having given at least one week's notice of its intention to make application therefor, which notice shall be in writing, and be served on the city clerk of said city, and said corporation shall also cause said notice to be published in some newspaper circulating in Covington at least seven days before the making of such application, but nothing herein shall be construed to prevent said company from acquiring a right of way by assignment as provided in section 6 hereof." Under this charter, appellee bridge company did construct the bridge contemplated by the act, and did build approaches thereto on the Kentucky side of the river, and did connect its tracks with the tracks of the Kentucky Central Railroad Company. The Maysville & Big Sandy Railroad Company, now operated and controlled by the Chesapeake & Ohio Railway Company, had constructed a railroad into the city of Covington; and the track was built on the same roadway, and parallel to the other track connecting this road with the bridge company's road. In other words, the bridge company has built tracks from its bridge connecting it over one roadway with two different railroads operating in Covington, Ky., which were, under the charter of appellee bridge company, entitled to transfer privileges over bridge into Cincinnati.

For appellants it is argued that the authority to appellee to construct a double track road is not shown in this case, because there was not a compliance with section 10 of appellee bridge company's charter, above quoted, in which it was required to give notice in writing, to be served on the city clerk

and published in some newspaper circulated in Covington for at least seven days before the making of such application for roadway. Whether such notice was given is not shown. It is not argued or shown that a specific grant of roadway to the bridge company was made by the city council. It seems from the record that the bridge company's connecting tracks were in fact built by the Chesapeake & Ohio Railway Company, and are operated by it, under the management and charter of the bridge company. The record discloses abundant instances, as early as 1889, when the Chesapeake & Ohio Railway Company was building, or shortly after it had completed, the line of the road in question, that the city council were negotiating with that company as to the manner of making certain grades on certain of the streets over which it crossed in the construction of such approach to the bridge, and wherein the railroad company was required to, and did, agree to bear the expenses of regrading certain parts of such streets, and of constructing sewers, etc., and of maintaining gates across certain streets, including Lewis and Craig streets crossing. Was this equivalent to a grant by the municipal corporation of a right of way across the street in question? In this state the legislature might have authorized the construction of a railroad across or along the streets of a town or city without the consent of the latter. *Railroad Co. v. Orr*, 91 Ky. 114, 15 S. W. 8. The legislative authority to appellee to construct the railroad in question was undoubtedly conferred. The only thing remaining was the assent of the municipal corporation of the city of Covington. The manner of giving this assent (that is, whether it should be by deed or by ordinance) is not stipulated. That the municipality had notice of appellee's purpose to construct the railroad in question, and as now operated, is evident. That it raised some objections to the exercise of this purpose in certain particulars, which were finally adjusted to its satisfaction, is also shown. That the railroad company, evidently relying upon these facts, in connection with the charter of the bridge company, built the tracks upon the route in litigation, with the knowledge and assent of the city, is apparent. Under these circumstances, would the city be permitted to say to the railroad company that it had not complied with the prerequisites named in the statute, and therefore it must leave the streets? We think not. It would be held estopped by its conduct, and appellee's reliance thereon, to the extent that it constructed an expensive railway over the streets in question. Appellee having the right to construct its "railroad tracks" over such streets as the city might permit, and the city of Covington having acquiesced in the construction of the tracks, for the purposes and to the extent authorized by appellee's charter, it must be held to be bound by its conduct in the premises as fully and to every extent as if such authority had been granted by ordinance duly passed. There is no good reason why the

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municipality should not be held to the same standard of honesty in such matters, when applying to it an estoppel, as other persons would be. In *Kneeland v. Gilman*, 24 Wis. 39, cited and adopted as basis of text in *Herm. Estop.* 1363, it was said: "But of late years, much more than formerly, the doctrine of estoppel, most wholesome and just in its operation when properly applied, has been extended to these municipal corporations, so as to bind and conclude them by their own acts and acquiescence, and the act and acquiescence of their officers, whenever an estoppel would exist in the case of natural persons. It is now well settled that, as to matters within the scope of their powers and the powers of their officers, such corporations may be estopped upon the same principles and under the same circumstances as natural persons."

We conclude, therefore, that appellees have acquired the right to build the double-track road at the places now occupied, and in question in this suit. It therefore follows that applying the doctrine of the cases of *Railroad Co. v. Orr*, *supra*, and *Roulston v. Railway Co.* (Ky.) 54 S. W. 2, the statutory bar of five years pleaded by appellees in this case against appellants' right of recovery was applicable, and that the circuit court rightfully gave a peremptory instruction based thereon. The majority opinion proceeds upon the theory that although appellees had a perfect right to build a single-track railway over the route in question, yet by building an additional track they have become liable for the damages resulting from all operation of trains over it,—the additional track,—but not for the smoke, noise, etc., caused by the operation of the trains on the first track. The damages for which appellants sue are not really due to the existence of the two tracks, but the existence of noise, smoke, cinders, and jarring caused by the trains. These conditions would exist just the same whether these trains passed over one or two tracks, it not being shown in the record that both tracks were ever used at this point at the same moment.

BURNAM and DU RELLE, JJ., concur with O'REAR, J.

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*In re* DIRECTORS OF NEW YORK, N. H. & H. R. Co.

(*Supreme Judicial Court of Massachusetts, Plymouth, Jan. 8, 1903.*)

[65 N. E. Rep. 815.]

**Railroads—Grade Crossing—Abolition—Petition—Discontinuance.**

A petition to abolish a grade crossing, under St. 1890, c. 428, St. 1891, c. 262, St. 1892, c. 374, and St. 1895, c. 491, may not be discontinued by petitioners when it has proceeded to the appointment of commissioners, after an appearance by the town in which the crossing is situate, and on its objection to such discontinuance.

Appeal from superior court, Plymouth county; Braley, Judge.

*In re* Directors of New York, etc., R. Co

Proceedings by the New York, New Haven & Hartford Railroad Company, by its directors, for the abolition of a grade crossing. From an order denying petitioners leave to discontinue the proceedings, they appeal. Affirmed.

The case came up on "a discontinuance of petition" filed by the petitioners, and a motion by them "for leave to discontinue their petition." The town of Hingham contended that petitioners could not discontinue their petition as of right. The court ruled that petitioners have leave to discontinue as to all crossings except the crossing at Rockland street, and that as to that the petition was to stand for further hearing, and petitioners appealed.

J. H. Benton, Jr., for petitioners.

Jos. O. Burdett, for respondent town of Hingham.

LORING, J. Prior to January 31, 1896, a location was given to the Hingham Street Railway Company to construct and operate a street railway, with electric power, upon certain streets in Hingham, including Rockland street. Rockland street crossed a branch of the railroad of the New York, New Haven & Hartford Railroad Company at grade, which at that time was operated by electricity. When this location was granted to the street railway, no method had been devised for the arrangement of the trolleys of two railways operated by electricity, which cross each other at grade. A controversy arose between the two companies as to the right of the railway to cross the railroad, and as to the method of carrying its wires over the railroad so as not to render the operation of the railroad by its trolley wires unsafe. In February of the same year the railroad brought a bill in equity, in which the railway appeared, and the cause was sent to a board of three masters, who made a report "which prescribed a device and apparatus for adapting the crossing of the wires of the railway and the railroad for use, and prescribed the manner in which the parties should respectively operate their railroad and railway at said crossing." On June 8, 1896, a decree was made confirming this report, and the railroad and railway have since then been operated in safety in accordance therewith. On the same day on which the railroad filed its bill in equity, its directors brought the petition now before us for the abolition of this crossing and other grade crossings in the town of Hingham. The town entered an appearance, and on June 6, 1896, commissioners were appointed for the abolition of the crossings mentioned by the petitioners. A hearing was had at Hingham by the commissioners in the same month of June, 1896, at which the parties appeared, and the commissioners took a view of the several crossings and adjourned. No further action was taken in the matter until December, 1900, when the petitioners filed a motion for leave to discontinue, and a discontinuance of the petition. The respondent town assented to the discontinuance as to all the



grade crossings except the crossing of Rockland street and the railroad of the petitioners. "The counsel for the town stated that this assent was upon the ground that the other crossings could not be abolished without great and disproportionate expense, and that since the filing of said petition, by reason of the consolidation of the street railways connecting with Nantasket, and of the increased travel over said Rockland street and crossing caused thereby, and also of the general increase in travel over said crossing, the danger thereat has been greatly increased, and that, in the opinion of the selectmen of the town, said crossing can be abolished at a comparatively small expense. The counsel for the railroad company claimed that the petition for the alteration of the grade crossing at Rockland street was in aid of its bill in equity to regulate the method of adapting the trolley wires at that crossing for safe and proper use, and that the superior court took jurisdiction of that matter, and appointed masters to prescribe a method for the safe operation of the railroad and railway over this crossing, and it did not desire further to prosecute its petition, and therefore no action had been taken thereon." The presiding judge found that "their respective claims were in accordance with the facts," and ruled that the petitioners did not have an absolute right to discontinue, against the objection of the town, and ordered that the "discontinuance of petition" filed by them be not allowed. He further ruled, "said town assenting, that the petitioners have leave to discontinue their petition as to all crossings described therein except the crossing at Rockland street, and that as to said crossing at Rockland street said petition is to stand for further hearing if either party desires. To which the petitioners excepted so far as the order allowed the petition to stand as to Rockland street." To these rulings the petitioners excepted. The case comes here on a report as to "the questions raised by said rulings and exceptions."

The contention of the petitioners is that the petition now before us is, by the terms of the act under which it is brought (St. 1890, c. 428), a proceeding in equity. It is provided in that act that "the superior court or any justice thereof sitting in equity in any county shall have jurisdiction," etc.; and this has been preserved in subsequent acts. St. 1891, c. 262; St. 1892, c. 374; St. 1895, c. 491. Being a proceeding in equity, the petitioners contend that they had the right to discontinue their petition when they did, because no right had been acquired by the town by decree or otherwise, in accordance with the rule as to which a bill in equity can be discontinued as of right, as laid down in *City of Worcester v. Lakeside Mfg. Co.*, 174 Mass. 299, 54 N. E. 833; *Hollingsworth & Vose Co. v. Foxborough Water Supply Dist.*, 171 Mass. 450, 50 N. E. 1037; *Kempton v. Burgess*, 136 Mass. 192. But in the last case it was said that the rule in equity obtains where "the plaintiff brings the bill for his sole benefit, and

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no other person is interested in its maintenance," and this statement is cited and approved in *Hollingsworth & Vose Co. v. Foxborough Water Supply Dist.*

We are of opinion that a petition to abolish a grade crossing between a railroad and a highway is not a proceeding in which no other person is interested, when it has proceeded to the appointment of commissioners after an appearance by the town in which the crossing is situate, and for that reason that the ruling was right that the petitioners had no absolute right to discontinue their petition. The question whether the presiding judge exercised his discretion wisely is not before us. There is no hardship cast on the petitioners by this conclusion, as has been contended by their counsel. If they do not wish to be taken to longer prosecute this petition, they can put a statement to that effect on record, if it does not already sufficiently appear from the discontinuance filed by them.

Case to stand for hearing as to the grade crossing of Rockland street.

**NEWTON v. MANUFACTURERS' RY. CO.**

*(Circuit Court of Appeals, Sixth Circuit, May 6, 1902.)*

[115 Fed. Rep. 781.]

**Eminent Domain—Title Acquired by Condemnation Proceedings—Laws of Ohio.**

The appropriation of land by a city for park purposes through condemnation proceedings, as provided by Rev. St. Ohio § 2515-28, does not vest the city with the fee, but the estate taken is limited to an easement for the purposes intended, and on the abandonment of such easement the land reverts to the owner from whom it was acquired or his successor in title.

**Same—Reversion—Abandonment of Easement.**

The condemnation of right of way for a railroad over lands previously condemned by a city for park purposes does not effect an abandonment by the city of its easement so as to work a reversion of the land to the owner of the fee.

**Same—Right to Compensation—Owner of Naked Fee.**

The owner of the fee to lands, an easement in which has been acquired by a city for park purposes through condemnation proceedings, on the condemnation by the city of right of way for a railroad across the lands may maintain an action against the railroad company to recover compensation for the additional burden imposed upon his land by the new easement, and such damage, if any, as may result from the new use.

In Error to the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

Harvey Scribner and Wilber A. Owen, for plaintiff in error.

King & Tracy and Brown, Geddes & Bodman (Thomas H. Tracy and Clarence Brown, of counsel), for defendant in error.

Before LURTON, DAY and SEVERENS, Circuit Judges.

DAY, Circuit Judge. The circuit court sustained a

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demurrer to the petition of the plaintiff against the railway company, setting forth, in substance: That on the 16th of July, 1894, the plaintiff was the owner of certain lands in the city of Toledo, known as lots Nos. 1 to 9, inclusive, and Nos. 24 to 32, inclusive, in block 19. Plaintiff avers that while he was the owner of said lands, on the 11th of August, 1892, proceedings were instituted in the probate court of Lucas county, Ohio, by the city of Toledo for the purpose of condemning said property for park purposes, which proceedings were instituted under and by virtue of the authority of the laws of Ohio (Rev. St. § 2515-28); and afterward the said proceedings were removed to the circuit court of the United States for the Northern district of Ohio, Eastern division; and that on the 16th day of July, 1894, judgment was rendered in such proceedings by the circuit court conveying to the city of Toledo an easement for park purposes in said block 19, and assessing damages to the plaintiff by reason of such appropriation in the sum of \$3,450. Afterward the city of Toledo used and enjoyed the said property as a public park, and on August 1, 1900, proceedings were instituted in the probate court of Lucas county, Ohio, seeking to condemn for railroad purposes a right of way over and across said block 19, and over and across blocks 18, 20, 21, 22, and 42, said land being a strip 25 feet wide through block 19, and 40 feet wide through blocks 18, 20, 21, 22, and 42. That on October 1, 1900, a resolution was adopted by the common council of the city of Toledo directing the city solicitor to have entered in the said action pending a verdict and judgment in favor of the city of Toledo in the sum of \$5,000 and costs. Afterward the Manufacturers' Railway Company, under and by virtue of the authority of the said condemnation proceedings, took possession of the strip 25 feet wide through block 19, and proceeded to lay down its tracks, and ever since that time it has been running its trains daily across said strip. Plaintiff avers that, by the abandonment by the city of Toledo of said strip 25 feet wide in block 19, the easement granted to the said city therein for park purposes has ceased and terminated, and plaintiff is entitled to recover the value of the part of block 19 so appropriated, to wit, the sum of \$5,000, for which a judgment is prayed against the said Manufacturers' Railway Company.

The appropriation in the original case in which the land was condemned for park purposes was under section 2515-28, which is as follows:

"Sec. 6. (Purchase of Lands; Appropriation of Land.) After such plan or system has been adopted as provided in the last section preceding, the board shall proceed by purchase, whenever the same can be done on terms satisfactory to the board, to acquire the title to the lands aforesaid, in the name of the city, and whenever the board can not obtain the title to such lands by purchase as aforesaid, the said board shall report to the common council of said city, a description of the

lands purchased by said board, if any, and also an accurate description of the land required or necessary to the plan or system aforesaid, which it has been unable to acquire, by purchase, and the said council may by resolution declare that it is the intent and purpose of the city to appropriate the said lands for the purposes aforesaid, as provided in section 2235 of the Revised Statutes; whereupon it shall be the duty of the city solicitor to institute proceedings in the name of the city to acquire the said land, which proceedings shall be conducted and governed by and in accordance with the provisions of title 12, div. 7, chapter 3, of the Revised Statutes of the state of Ohio (90 L. L. 321; 83 V. 175)."

Section 2232, Rev. St., provides that municipalities may appropriate realty for public parks, limiting the right to appropriate to so much as is necessary for the purposes to which it is to be applied. Section 2244 provides that a corporation may be required to file a full and accurate description of the property to be taken, and the objects proposed, etc. Section 2245, after providing for the manner of procedure in the hearing of the case, provides:

"The inquiry and assessments shall, in other respects, be made by the jury, under such rules and regulations as shall be given by the court; and when a building or other structure is situated partly upon the land sought to be appropriated, and partly upon adjoining land, and such structures can not be divided upon the line between such two tracts of land without manifest injury, the jury in assessing the compensation to any owner of the lands, shall assess the value of the same exclusively of the structure, and make a separate assessment of the value of the structure."

The extent of the interest acquired by an appropriation for park purposes must be determined in this case by a construction of the statutes involved, in view of the decisions of the supreme court of Ohio upon similar statutes, and we find little aid in the numerous authorities cited from other jurisdictions. The question before us is one of statutory construction in Ohio, wherein the decisions of the highest court of that state are of controlling authority. As we understand them, where the statute does not undertake to authorize the appropriation of the fee the estate is limited to an easement for the purposes intended. In *McCombs v. Stewart*, 40 Ohio St. 647, the case involved title to lands in which the right was appropriated to overflow the same by means of a dam. In speaking of the extent of the estate acquired, the supreme court, speaking by Judge Dickman, said:

"But whether the property taken is paid for in money or in accruing benefits and advantages, it should clearly appear by the terms of the act that it was the legislative intent to take a fee before such an intent can be given to it. In the absence of express words, a fee will not be deemed to be taken where the purposes of the act will be satisfied, as in the case at bar, with the taking of an easement."

In *Corbin v. Cowan*, 12 Ohio St. 629, it was held that the appropriation of lands for the location and construction of a canal did not carry with it the fee of the lands, and that when the canal was abandoned the lands would revert. The statute construed in *McComb v. Stewart* provides that when a corporation was empowered to appropriate land it might enter upon and take possession of so much as was necessary for the purposes aforesaid. In *Voight v. Railroad Co.*, 58 Ohio St. 123, 50 N. E. 442, the supreme court of Ohio held that an act which authorized an appropriation of lands for canal purposes, and provided "a complete title to the premises to the extent and for the purposes set forth in and contemplated by this act shall thereby be vested and forever remain in said company and their successors forever," authorized the acquirement of an easement only. The syllabus of that case, which in Ohio receives the sanction of all the judges concurring as the law of the case, contains this statement:

"(5) Lands acquired for its use by a canal company, a private corporation, organized under an act of the general assembly, before the adoption of the present constitution, as the Lancaster Lateral Canal Company, 24 Ohio Laws, p. 71, authorizing it to acquire lands for its use by donation, grant, or appropriation, without expressing the interest or estate to be acquired thereby, revert to the owner from whom they were acquired, on the abandonment of the canal, or his successor in title; the general rule being that, where lands are acquired for public use, an easement only is taken therein, unless the taking of a greater estate, as a fee simple, is expressly authorized by law; and the rule is the same where it afterward disposes of its canal to the state, which, under the act of 1825, takes a fee simple in lands condemned by it to the uses of its canal system."

The case of *Malone v. City of Toledo*, 28 Ohio St. 643, was one in which the statute expressly authorized the appropriation of a fee, and is not, in our judgment, applicable here.

Applying the principles determined in the Ohio cases to the statute under consideration, we are of opinion that the estate acquired for park purposes by the city was an easement only. In section 2515-28 we find that on failure to obtain the desired lands by purchase the council may declare the intention of the city to appropriate the same "for the purposes aforesaid"; that is, for park purposes. It is argued that the acquisition of lands for park purposes implies the necessity of acquiring the fee, as that is essential to the enjoyment of the lands for the intended use. This reasoning is equally applicable to lands appropriated for canal purposes, which must necessarily exclude the owner from any beneficial use of the lands taken, and would seem to require the ownership of the fee as much as an appropriation for park purposes; yet we have seen in the cases cited that the supreme court has held, in the absence of an express statute, that no more than an easement is acquired.



It is further argued that compensation for lands taken under the statute, requiring that the value of lands should be assessed, shows that the same has been paid for once, and therefore it would be unjust to require further payment for the lands which have been fully compensated for. As we understand the decisions of the supreme court of Ohio, above referred to, the estate taken does not so much depend upon the compensation given as upon the authority contained in the statute to acquire the lands. Nor do we feel at liberty to disregard the allegation of the petition that the land was appropriated and conveyed for park purposes only. In view of these allegations, admitted by the demurrer, we cannot assume that the statutory authority to acquire the easement for park purposes was so exercised as to result in the appropriation of the fee, if such title can be acquired without express statutory authority.

The theory of the plaintiff's petition is that, when the appropriation to the use of the railway company of the strip of land 25 feet wide was made, the easement in the land for park purposes was abandoned, and the land reverted to the original owner of the fee, who has the right to recover the full value thereof. We cannot consent to this theory. Abandonment is a question of intention. *Townsend v. Railroad Co.*, 42 C. C. A. 577, and note (101 Fed. 757); *Railroad Co. v. Ruggles*, 7 Ohio St. 1. In the leading case of *Hatch v. Railroad Co.*, 18 Ohio St. 92, where lands were purchased by a railroad company from a canal company, which had the easement in the lands, for railroad purposes, the supreme court of Ohio held that such purchase, through the forms of appropriation, was not an abandonment of the easement of the canal company, such as would work a reversion to the original owner of the lands in fee simple. Speaking of this question of abandonment, Judge Brinkerhoff said:

"And the intention to abandon may doubtless be inferred from circumstances, where they are strong enough to warrant such inferences. But here there are no circumstances indicative of an intention to abandon the easement acquired by the original appropriation, either by the canal company or by the state. The canal company, so far from abandoning it, has sold it, and put the price of it into her treasury, and the state has given no indication of her intention to abandon it. She has not proceeded by information in the nature of quo warranto or otherwise to question the franchise of the railroad company to operate its road upon the land formerly used by the canal company, and her policy of remitting the railroad companies to condemn lands to their use remains patent on her statute books."

In that case, as well as in the case of *Voight v. Railroad Co.*, supra, the supreme court held that the change of the use of the appropriated land from that of canal purposes to that of a railroad would not be an abandonment of the easement,

and would only entitle the owner to compensation for the additional burden imposed upon his land, and such damage, if any, as may result from the new use. Speaking upon that subject, Judge Brinkerhoff, in the Hatch Case, says:

“The easement in the plaintiff's land, appropriated by the canal company, was regarded, when taken, as a perpetual easement; it was so looked upon by both parties; courts and juries awarded compensation to the plaintiffs on this basis; and he cannot now claim with any semblance of justice to be paid over again for the same thing. Whether there may or may not be a case of such an utter contrariety in the uses for which a first appropriation was made and those to which the land is afterward sought to be devoted as necessarily to work an abandonment of the easement, and so a reversion to the owner in fee, we will not assume to say; but such, we think, is not this case.”

Applying the doctrine here settled as to abandonment to the facts of the present case, we find no intention on the part of the city to abandon the lands appropriated for park purposes, nor such utter destruction of the estate acquired as would warrant the conclusion of abandonment. The lands were appropriated by the railway company under the authority of the state. Except the one strip referred to, no part of the land originally appropriated was taken. Across this strip the railway company acquired the right of way. This strip was taken, except as to the amount of damages to be paid, by proceedings adverse to the city of Toledo. The property originally appropriated continued to be used for park purposes subject to the use of the strip 25 feet wide for railroad purposes. Certainly there is no intention of abandonment on the part of the owner under these circumstances, nor do we find in the running of a railway on the narrow strip in the park such abandonment of the appropriation as would work a forfeiture of the state. In *Platt v. Pennsylvania Co.*, 43 Ohio St. 228, 1 N. E. 420, 22 Am. & Eng. R. Cas. 129, relied upon by plaintiff in error, the abandonment was clearly made out in the voluntary sale by one railroad company to another of a part of the right of way originally appropriated.

While we do not think the plaintiff can recover the value of the land as upon an abandonment, it follows, however, under the authority of *Hatch v. Railroad Co.* and *Voight v. Railroad Co.*, supra, that he is entitled to compensation to the extent of the damages he has sustained by reason of the additional burden imposed upon his lands. As was said in *Hatch v. Railroad Co.*, quoted with approval in *Voight v. Railroad Co.*:

“As the owner of land, subject to a perpetual easement, but appropriated and paid for only for the purposes of canal, he had rights which the railroad company cannot be permitted to ignore, and which, we think, he ought to have instituted proceedings regularly under the statute to condemn and pay

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for, before it ventured to divert the easement to uses so variant from those originally intended. But this not having been done, and the plaintiff having been restricted to his action for compensation, the rights of the parties are governed by the same principles which would have been applicable in such a proceeding."

It is true the petition seeks a recovery upon the ground of abandonment, but, under the Ohio practice, if the facts stated constitute a cause of action, the demurrer should have been overruled, notwithstanding the petition may contain allegations which would not entitle the plaintiff to a recovery upon another theory. In this case the petition states facts sufficient to entitle the plaintiff to recover for such injuries as he has sustained by reason of the additional burden imposed upon the fee by its appropriation to railroad uses.

The judgment will be reversed, and the cause remanded to the circuit court, with instructions to overrule the demurrer.

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SNOUFFER v. CEDAR RAPIDS & M. CITY RY. CO.  
CEDAR RAPIDS & M. CITY RY. CO. v. CITY OF CEDAR  
RAPIDS *et al.*

(*Supreme Court of Iowa, Oct. 28, 1902.*)

[92 N. W. Rep. 79.]

**Right of Way—Dedication and Implied Acceptance of Highway.**

In 1874 property owners along a 66-foot road dedicated additional land so as to make it 120 feet in width, and it was afterwards so generally regarded. In 1879 a corporation obtained from the abutting property owners consent that a "street" railway might be built "on and upon said boulevard," and the railway was built along one side of the enlarged street. As a defense to an action by the county to enjoin the company from such use of the road, the company successfully relied on a statute authorizing the construction of such railway on "highways" over 100 feet in width. The county also refused to accept the dedication of the property owners: *held*, that the company's right of way was not derived by grant from the property owners as over private property, since dedication and acceptance of the additional strip by the public was inferable from such circumstances, regardless of the absence of a formal acceptance by the county.

**Same—Right to Lay Street Railway Tracks—Repeal of Ordinance.**

An ordinance was passed authorizing a street railway company to lay its tracks on a certain grade and in a certain manner. Six years later, when the repeal of the ordinance was being discussed, the company made its first move under the ordinance: *held*, that such action was colorable only, and would not deprive the city of its rights of repeal.

**Street Railways—Power of City to Compel Change in Location of Tracks—Impairment of Obligation of Contract.\***

An ordinance ordered a street railway company to move its tracks from the side of the street to a rock-ballasted curbed strip 20 feet wide in the middle of the street, elevated several inches above the 25-foot driveways on either side. Six years later the city passed a repealing ordinance again ordering the removal to the middle, but also ordering the paving and lowering of the tracks to grade: *held*, that the second

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ordinance was not invalid as a violation of a contract or vested rights, since a city cannot be divested by ordinance or contract of its legislative power to make changes in its streets in the exercise of a reasonable discretion.

**Municipal Corporations—Exercise of Legislative Power—Reasonableness—Burden of Proof.**

The burden is not cast upon a city to show that its exercise of legislative power is reasonable.

**Street Railways—Power of City to Compel Change in Location of Tracks.**

Under the authority of a statute providing that street railway companies might extend their lines into the county over highways 100 feet or more in width, a company constructed its line out upon such a highway. The highway afterwards became a city street: *held*, that the use of the road, as granted by the statute, was subject to the governmental control of the highway, and that hence the company could be compelled by ordinance of the city to move its tracks, the same as any other street railway.

**Same—Regulations—Effect of Change of Motive Power.**

A motor line operating a street railway on a certain street purchased the franchise of an electric street railway company calling for an electric line along the same street, and also providing regulations for the construction and maintenance of the tracks. The motor line changed its power to electricity, but continued to occupy the same tracks: *held*, that the regulations of the charter applied to the old motor tracks.

**Same—Same—Change in Location of Tracks.**

An ordinance ordered the removal of street car tracks from the side of a street to a strip in the middle 20 feet wide, to be curbed and rock-ballasted, and elevated several inches above the adjoining 25-foot driveways. Afterwards a repealing ordinance was passed ordering the tracks to be moved to the middle of the street, but to be constructed at grade, and the ground so occupied to be paved in accordance with the rest of the street. The company was operating under a charter requiring that the car tracks be paved and constructed at grade so as to afford no unnecessary obstruction to travel: *held*, that both on general principles and under the charter the repealing ordinance constituted a reasonable exercise of the city's legislative control of its streets. Code, §§ 753, 767.

Appeal from district court, Linn county; Wm. G. Thompson, Judge.

The case is stated in the opinion. Affirmed.

Chas. A. Clark & Son and Wm. G. Clark, for appellant.  
John N. Hughes, for appellee city of Cedar Rapids.

Heins & Heins and Hubbard, Dawley & Wheeler, for appellee J. J. Snouffer, Jr.

**WEAVER, J.** The facts essential to an understanding of this controversy may be stated as follows:

For many years prior to 1879 a public highway connected the cities of Cedar Rapids and Marion. Beginning as early at least as the year 1874, the property owners along that portion of said route now under consideration dedicated or attempted to dedicate additional land to the public for the use of said highway, making it 120 feet in width, and as thus enlarged such highway was thereafter known as "The Boulevard" and later as "First Avenue." In the year 1879, a corporation

formed for that purpose undertook the construction between the two cities of a street railway to be operated by animal or motor power, and to lay the same within the boundaries of said highway as enlarged by the dedications above mentioned. In furtherance of this purpose the property owners along the route, or many of them, in May, 1879, signed a written instrument, the body of which is as follows: "We, the undersigned property owners on the boulevard between Cedar Rapids and Marion hereby consent, grant, and assign right of way for the purpose of a street railway between the said cities of Cedar Rapids and Marion on and upon said boulevard to the Marion and Cedar Rapids Improvement Co., said railway to be in operation in one year from May 1st, 1879; otherwise our permission as above to be null and void." Just when the railway was completed is not entirely clear, but probably in the spring or summer of 1880; the track being laid within the 120 feet aforesaid, but near the southern boundary thereof. March 12, 1880, the legislature of the state passed an act, which, while general in form, bears evidence of having been framed with special reference to this enterprise. That portion of said act having any bearing upon the result of this case is as follows: "Section 1. That any street railway company now or hereafter organized under the laws of this state to operate a street railway in any city or incorporated town in this state, for the purpose of extending its railway beyond the limits of such city or town, may locate, build and operate either by animal or motor power, its road over and along any portion of a highway which is of a width of one hundred feet or more. In such cases said company, as soon as practicable, shall put said highway in as good repair and condition as the same was before its use for the purpose herein contemplated; and boards of supervisors are herein authorized to accept for highway purposes under this act, conveyances of land adjoining any highway or part thereof sufficient to increase said highway to the width of one hundred feet." Acts 18th Gen. Assem. c. 32. At this time that part of the enlarged street where plaintiff Snouffer now resides was outside of the corporation limits of Cedar Rapids, and was not annexed to said city until December 8, 1884. In January, 1881, the board of supervisors of Linn county passed a resolution declining "to accept any conveyance or dedication of land adjoining the highway between Cedar Rapids and Marion." In July, 1881, one S. C. Bever, being the owner of the property bordering on said highway between what are now known as "Fifteenth" and "Eighteenth" streets of the city of Cedar Rapids, and including the tract now owned by the said Snouffer, made and filed in the proper office a plat and instrument of dedication, making the street in question 120 feet wide. It would seem, however, that this dedication must be regarded as confirmatory of an actual or attempted dedication made at some earlier date, for, as we read the testimony, the street had been gen-



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erally recognized as of the full width of 120 feet long prior to the filing of said instrument. The railway was operated by the company constructing it, though under a varying name, until September 29, 1891, when it sold and assigned its property and franchises to the present owner. May 1, 1891, the city of Cedar Rapids granted to a corporation known as the Thomson-Houston Electric Company an exclusive franchise for the construction and operation of an electric railway in said city, upon such streets as should be indicated by said corporation in accepting said grant, but requiring that among the routes to be selected should be one leading from the business portion of Cedar Rapids to the northeastern limits of the city. June 9, 1891, the Thomson-Houston Company accepted the franchise, and designated First avenue, or the Boulevard, as the route selected between the business portion of the city and the northeastern limits of the incorporated territory. Thus, it will be observed, the new or electric line, as designated, was made to occupy the same street with the Cedar Rapids & Marion Motor Line. By the terms of the grant the Thomson-Houston Company bound itself to pave between the rails of its tracks and one foot in width on either side of such tracks on all paved streets upon its route, and to so lay its rails as not to interfere with the safe crossing of its lines by vehicles, and generally to so use and operate its line as not to unnecessarily impede the public travel on any street, and upon completing the construction to restore said streets to as good condition as had existed at the time of its entry thereon. It also undertook to complete the construction of the designated lines in six months, and to hold its property subject to the proper orders of the city for the improvement of its streets, and to promptly raise or lower its tracks to conform to any changes made in the grade of the streets. In January, 1892, and before the electric line of railway had been constructed upon First avenue, the Cedar Rapids & Marion City Railway Company, owner of the motor line, purchased the property, rights, and franchise of the Thomson-Houston Company, and on May 20, 1892, said purchase having been reported to the city council of Cedar Rapids, that body adopted an ordinance approving and confirming said transfer, and declaring that all of the rights and franchises theretofore granted to the Thomson-Houston Company "are hereby granted, confirmed, and vested in the Cedar Rapids & Marion City Railway Company, subject, however, to all the terms, conditions, limitations, and liabilities contained" in the original grant. Upon obtaining this franchise, the Cedar Rapids & Marion City Railway Company adopted and thereafter used electricity as a motive power for operating all its lines, both those it had formerly operated by animal or steam motor power and those acquired by purchase. It also proceeded to construct and equip the several lines left unfinished by its grantor, except upon First avenue, where,

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instead of putting in a new track, it made use of the track of the old motor line, situated, as we have already stated, near the south boundary of said street. On March 8, 1895, while the Cedar Rapids & Marion City Railway Company were still using the track of the old motor line on First avenue for the operating of electric cars, the city council of Cedar Rapids enacted an ordinance known in the record as "No. 409," and around which much of the contention in this case centers. Such ordinance provided, in effect, that the 120 feet of First avenue should be improved upon the following plan: 25 feet upon each side of said avenue was ordered set apart for parking, and 20 feet in the middle of the street devoted to the use of the street railway company, which was ordered to remove its line from the south side of the avenue to the 20-foot strip above mentioned, and to construct a double track thereon. A curb was to be erected at the border of the parking, also along either border of the 20-foot space above mentioned, and the space between the curb lines was eventually to be paved; but the strip to be occupied by the railway as aforesaid was to be "ballasted with rock," except at street crossings, which were to be planked. The curb was to be 12 inches in depth, and the 20-foot strip, when improved according to said plan by setting the curbs and ballasting between them, would be elevated above the adjacent paving by several inches. The net result of this improvement, if completed, would be two parallel paved roadways of 25 feet each, separated by a 20-foot strip carrying the railway tracks, and ballasted with stone to a height which would render crossing the same with carriages impracticable except at street intersections. The last section of said ordinance provides that it shall take effect from its acceptance in writing by the railway company, and declares the intention to be that the company shall have the same right in the new location provided for it as it then legally possessed in the old location, subject only to the limitations expressed in such ordinance, and that, on the change being made, all rights of the company in the old location should cease. After the passage of Ordinance No. 409 in March, 1895, neither the city nor the railway company took action thereunder, and the company continued to operate its line on the old location for more than six years. In the spring of 1901 a proposition to repeal said ordinance was pending before the city council, but, before the matter was finally disposed of, the railway company began, or attempted to begin, the construction of a new double track in the middle of the avenue in front of the property of the plaintiff Snouffer, with the avowed purpose of making and improving such location in accordance with said Ordinance No. 409. On June 6, 1901, Snouffer began the suit first above entitled against the railway company and the city, alleging that the railway, as it was being constructed, was a nuisance, and that Ordinance No. 409 was unreasonable and void, and asking to enjoin such

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construction. On the 21st of June, 1901, the city council passed an ordinance repealing Ordinance No. 409, and soon thereafter, by another ordinance and resolution, ordered the railway company to move its track from the side to the middle of the street, and in such reconstruction to make the surface of its road and track conform to the grade of the street, and in such manner as would permit the passage of teams over and across the same. On June 29, 1901, the railway company began its action, the second above entitled, making the city, its mayor and council, and Snouffer defendants, setting up its alleged rights under Ordinance No. 409 and under the original franchise granted to the motor line, and asking that its right to construct its track in accordance with the terms of said ordinance be established and confirmed, and that defendants be enjoined from interfering therewith. By answer and cross-petition setting up the facts heretofore stated the city asked a decree requiring the railway company to move its tracks to the middle of the street, and to place the same upon the grade of the street in accordance with its order last above mentioned. All the issues taken upon these various demands were consolidated for trial. The decree of the district court denied the relief asked by the railway company, and dismissed its petition, and ordered the company to place its tracks in the middle of the street, and to do the paving between the rails and one foot on either side of the tracks. The railway company appeals. This tedious statement, condensed from the pleadings, which make over 80 pages of printed matter, has seemed necessary to a fair understanding of the several claims of the parties and the manner in which their alleged rights have had origin.

1. In its original pleading the railway company alleged that prior to the vesting of any right in itself the highway between Cedar Rapids and Marion was at all points 100 feet wide, and that at the time its line of road was located the highway at the point involved in this litigation was of the uniform width of 120 feet or more, and that its track was located thereon under the act of the legislature hereinbefore referred to. Subsequently this allegation was withdrawn, and it was alleged that, the dedication of the adjacent owners not being accepted by the county, the true width of the street was but 66 feet, and that the right of way occupied by the company was derived primarily by grant from the owners as a right of way over private property. This proposition cannot be sustained. It is quite clear that when the project of constructing the railway was first conceived all parties concerned, relying upon the voluntary action of the owners of abutting lands in dedicating or attempting to dedicate the additional width to the use of the public, believed and understood that the highway at this point was 120 feet wide and that it was "at all points" of the route between the two cities not less than 100 feet wide. Evidently on the theory that the consent of the abutting

owners was all which was necessary to authorize the use of the street for the railway, the corporation obtained such consent in writing. The language employed in the instrument is very significant: "We, the undersigned property owners on the boulevard between Cedar Rapids and Marion, hereby consent, grant, and assign right of way for the purpose of a street railway between said cities of Cedar Rapids and Marion on and upon said boulevard," etc. As illustrating the force of the words "on and upon" in this connection, see *Heath v. Railway Co.*, 61 Iowa, 14, 15 N. W. 573, 10 Am. & Eng. R. Cas. 313. This writing can be reasonably interpreted and explained upon no theory except the recognition of the boulevard as a public street by all the parties to the transaction. Thereafter, and while the railway was yet in the course of construction, this court had occasion to decide that, in the absence of statute, the occupation of a street by a railway operated by motor power is unauthorized. *Stanley v. City of Davenport*, 54 Iowa, 463, 2 N. W. 1064, 6 N. W. 706, 37 Am. Rep. 216; *Stange v. Railroad Co.*, 54 Iowa, 669, 7 N. W. 115. Stimulated, no doubt, by these decisions, resort was had to the legislature, which established and confirmed the right of this railway company to the use of the boulevard by enacting that "any street railway company now or hereafter organized, \* \* \* for the purpose of extending its railway beyond the limits of such city or town, may locate, build, and operate, either by animal or motive power, its road over and along any portion of a highway which is of a width of 100 feet or more." This statute was the subject of judicial interpretation very soon after its passage. While the railway was still in the course of construction, Linn county brought an action to enjoin the company's use and occupation of this highway. Injunction being refused, the county appealed to this court. The position then assumed by the company was that the street was 120 feet wide, and its occupancy thereof was, therefore, under the protection of the statute. That position was sustained, the court, in its opinion, saying: "The statute above quoted contemplates the existence of highways of 100 feet or more. Unless such highways may exist, the statute would be inoperative. It must, therefore, be interpreted as authorizing them. The boulevard, as a highway of 120 feet in width, is therefore legalized by the act above quoted, which also legalizes the railroad constructed along it." But it is urged that the board of supervisors refused to accept the dedication of the extra width of street. We think, however, that fact is not necessarily decisive of the legal existence of the boulevard. The dedication of a street may be accomplished without any deed or formal act by the dedicator, and without any formal declaration of acceptance by the public authorities. *Morrison v. Marquardt*, 24 Iowa, 35, 92 Am. Dec. 444; *Fisher v. Beard*, 32 Iowa, 346; *Mosier v. Vincent*, 34 Iowa, 479; *Getchell v.*

Benedict, 57 Iowa, 121, 10 N. W. 321; Manderschid v. City of Dubuque, 29 Iowa, 73, 4 Am. Rep. 196; Gear v. Railroad Co., 39 Iowa, 23; Bayliss v. Supervisors, 5 Dill. 549, Fed. Cas. No. 1,142. The dedication may be shown by the verbal declarations of the owner, by his act in filing the plat, by his silence in face of known adverse possession by the public, or by any other act or omission from which the intention to dedicate may fairly be inferred. Acceptance may also be inferred from general use of the way by the public, or by the improvement and repair of the way by the authorities having care and control of the highways. The owners of abutting property may also divest themselves of all title in favor of the public by laying out a street and selling lots or parcels of land with reference thereto, and this rule is not subject to any acceptance by the public generally or by the authorities. Shea v. City of Ottumwa, 67 Iowa, 39, 24 N. W. 582; City of Pella v. Scholte, 21 Iowa, 463. In the present instance it is well proven that the existence of the boulevard as a street or highway 120 feet wide, devoted to the public use, has been recognized since a time some years before the railway company acquired any rights therein; that improvements have been made with reference thereto; that the very acts by which the company obtained permission to use said right of way, and the statute which confirmed and legalized such occupancy, implied an admission of the public character of the boulevard; that the actual use of said boulevard as a public way has been continuous, and that until the commencement of this controversy there has been nothing in the conduct of the railway company to indicate any claim of right or title to its location other than is acquired by street railway companies generally in streets over which their lines are operated. We think, therefore, that the boulevard on First avenue must be considered as a public street of 120 feet in width from a date anterior to its occupation for railway purposes, and that the fact, if it be a fact, that no part of the railway track is within the limits of the original 66 feet of said way, is immaterial in determining the rights of the parties in this litigation.

2. Much argument has been submitted upon the validity of Ordinance No. 409, and upon the power of the city generally to enact ordinances of that nature. In view of the conclusion we have reached that the judgment of the district court may be affirmed upon another proposition, we will not undertake at this time to pass upon the questions thus raised farther than to say that, whatever may be the powers vested in city governments in this respect, they must not be exercised arbitrarily or unreasonably.

3. Generally speaking, the power of the city council to repeal an ordinance is no less broad than its power to enact, though it is true that rights may have been acquired under such ordinance which a repeal cannot destroy or impair.



Ordinance No. 409, under which the railroad company claims its right to appropriate the use of 20 feet in the middle of First avenue, and exclude the public therefrom, was repealed in June, 1901. It had been in existence more than six years. During that period the railway company had made no attempt to exercise any rights under it, or to expend any time or money upon the strength of its provisions, until the matter of repeal was being agitated in the council; and we think it may fairly be said the effort then made by the company was colorable only, and ought not to operate to deprive the city of its power to annul the measure which for six years had stood a dead letter upon its ordinance book. Moreover, it must be remembered that the control and improvement of its streets are vested in the city, and that the right of the railway company in the streets is subordinate to this power and authority in the municipality. *City of Detroit v. Railroad Co.* (Mich.) 51 N. W. 690; *State v. Railroad Co.* (Minn.) 81 N. W. 201; *Lake Roland El. Ry. Co. v. City of Baltimore*, 77 Md. 352, 26 Atl. 510, 54 Am. & Eng. R. Cas. 11, 20 L. R. A. 126. This power of the city cannot be abrogated by ordinance or relinquished by contract. It is indefeasible. In *State v. Graves*, 19 Md. 351, 81 Am. Dec. 639, the court says: "The mayor and city council are but trustees of the public. The tenure of their office impressed their ordinances with liability to change. They could not, if they would, pass an irrevocable ordinance. The corporation cannot abridge its own legislative powers." We are cited by appellant to *City of Burlington v. Burlington St. Ry. Co.*, 49 Iowa, 144, 31 Am. Rep. 145, where we held the city not authorized, under the facts there shown, to amend a street railway ordinance abridging a right formerly granted. The reason for that decision is explained in the opinion by the statement that there was no allegation or claim that public convenience or necessity required the proposed amendment, and no showing that the work as originally authorized would create any nuisance, or work any injury to the city or any citizen. Moreover, no question was there made as to the power of the city to enact the ordinance sought to be amended. Here, however, these points are all raised. It is shown that the carrying into effect of the provisions of Ordinance No. 409 would for all practical purposes convert the boulevard into two narrow ways separated by a barrier impassable to teams, thus compressing the driveway available to an adjacent residence into a paved path of 25 feet, in which a team could not be conveniently or safely turned, especially in the presence of rapidly moving cars. That such a plan, carried into operation, would not only obstruct the public in the use of a street which is conceded to be an important and much-frequented thoroughfare, and that the result thereof would be detrimental to the use and value of the abutting property, is very apparent; and to enforce such regulations may well be said, under some circumstances,

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at least, to be an unreasonable exercise of municipal power. *Lake Roland El. Ry. Co. v. City of Baltimore*, 77 Md. 352, 26 Atl. 510, 54 Am. & Eng. R. Cas. 11, 20 L. R. A. 126, above cited, is an instructive case, and discusses this phase of municipal authority with a clearness of reasoning which gives much weight to its decision. The city of Baltimore by ordinance gave the street railway permission to lay a double track on Lexington street, but thereafter repealed the ordinance, and modified the privilege to the use of a single track on conditions named. There, as here, the railway company expended no money in laying its track until after it was aware that the ordinance was about to be repealed. There, as here, it was contended that the ordinance was in the nature of a contract with the company, which could not be impaired by repeal. After a very full examination of the authorities and statement of the manner in which the railway as authorized by the ordinance obstructed the convenient use of the street, the court says: "The control of the city over the streets is attended with a duty of preserving them for their legitimate purposes. They are intended for the passage of the people over them on foot, on horseback, and in vehicles on their various occasions of business, convenience, and pleasure. It is not competent for the city to defeat the primary purposes for which they were dedicated to the public use. They are highways, and must be maintained as highways, so long as they are kept in existence. The power over the streets is held in the same trusts as other legislative powers conferred on the mayor and city council. It is intended to be used for the purpose of preserving them in the character of streets in such condition as to be most suitable for the public use. It is of incalculable importance to the public interest, and there can be no more reason to suppose that the city can abridge or surrender this legislative power than any other. \* \* \* If an ordinance cannot be repealed which will reduce Lexington street to the condition we have described, then truly the city council have lost control over the streets, and have renounced their legislative power; and it will be demonstrated that they have the power to destroy their utility for the legitimate purposes of streets, and to convert them into places of extreme peril to life and limb, but not the power to keep them in a condition suitable for their ordinary use as highways. Our municipal governments were not instituted for the purpose of making any such result possible. The repealing ordinance was passed because, as stated in the preamble, the city council thought it was required by the public safety and convenience and the proper regulation of the use of the streets. These considerations for the repeal were within the legislative judgment and discretion, and the evidence shows that the ordinance has a real and substantial relation to the objects proposed. It is therefore not subject to supervision or review by the courts. This legislative authority

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over the streets, delegated to the city, is sometimes classified as belonging to the police power; that is to say, that great power which embraces the protection of life, limb, health, and property, and the promotion of the public peace and safety. It is a high conservative power of the utmost importance to the existence of good government. It has been most emphatically declared by the supreme court of the United States that a state cannot limit its exercise of this power by contract or in any other way. Some of the best known and most striking cases are *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079, *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989, and *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036. But supposing this designation not to be appropriate in the present instance, the name given to the power is of no importance. It is expressly conferred by the legislature." Upon a rehearing Alvey, C. J., adds a supplemental opinion, which is in part as follows: "The mayor and council, by the statutory provision, are invested with express authority to regulate the use of the streets, lanes, and alleys of the city by railway or other tracks; and this, as I understand it, is but an amplification of their general power over, and right and duty to regulate and maintain, streets and other highways of the city for the use of the public. \* \* \* This power to maintain and regulate the use of the streets of the city is a trust for the benefit of the general public, and the primary use of the streets is not by any means that of furnishing tracks for street railways. The mayor and city council cannot divest themselves of this trust, nor can they so restrict their power over the streets as to defeat or seriously impair the beneficial enjoyment of the streets by the public in the ordinary and usual modes of passage thereon. The power vested in them in respect to the streets is of a legislative character, and they cannot restrict themselves nor their successors by any irrepealable ordinance in the exercise of such power over the streets, except it be by the express authority of the legislature of the state. The power is a continuing one, to be exercised whenever the public needs may require it, and hence the power to regrade and improve the streets from time to time must remain subject to the judgment and discretion of the legislative branch of the municipal government. But, if the contention of the appellant could be maintained, the streets on which railway tracks are once laid might, and most generally would, pass out of control of municipal authority; for, however improvident or reckless might be the grant of privileges to street railway companies, or however much their tracks might obstruct the use of the streets by the general public, perpetual easements or servitudes would be created in the streets, and the municipal authorities would be precluded from the exercise of the ordinary power of changing grades or making other improvements that might materially interfere with the tracks or the

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operation of the road, though public necessity for such improvement might be never so urgent; and in such case the only means of reclaiming the street to the absolute control of the city authorities, and to the general public use, would be by resort to the power to eminent domain." Further answering an objection which is also urged in the present case, the opinion continues: "I am aware that it may be urged (and it constitutes the full strength of the appellant's case) that upon the principles I have stated as the grounds of my judgment there would be no sufficient protection to the property rights in a street railway. I am far from saying that such property rights are not entitled to protection. If, in reliance upon a valid ordinance, a railway company, in good faith, and without notice that the authority is about to be modified or withdrawn, has laid its tracks in the streets of a city, and the municipal authorities conclude afterwards that the grant of the privilege was improvident, or detrimental to the public, and require the tracks to be removed, this can be enforced only upon the principles of fair indemnity to the company. This is in accord with a well-established principle in the case of an executed license, where, to entitle the licensor to revoke the license and to be restored to his former rights, he must do justice to the licensee by indemnifying him for the expense which he has reasonably incurred under the license, but not for prospective profits that might be realized. This measure of indemnity—the principle of justice would seem to require in such case as I have just stated."

The case of *State v. St. Paul City R. Co.* (Minn.) 81 N. W. 200, is also in point. The railway company, acting under an ordinance of the city, had constructed and was operating a system of street railways. Thereafter the city ordered a material change in the manner of operation. This was resisted by the company on the theory that the original ordinance was a contract, and that the later ordinance was an attempt to impair the obligations of such contract. The trial court held with the company, but its judgment was reversed on appeal. We quote from the opinion: "The trial seems to have been conducted upon the theory that the ordinance or franchise was to be construed precisely as if it was a contract between two private individuals. This, however, is a too narrow, and even erroneous, view of the case. We shall assume, without discussion, that Ordinance No. 1,227 contains a valid contract between the city and the railway company, the obligations of which the former cannot impair. But this proposition is subject to the following qualification: Among the governmental powers vested by the charter in the city council is the care, supervision, and control of streets and highways. Without attempting to define the extent or limit of the powers thus granted, it unquestionably gives the common council authority to enact such police regulations regarding the use of streets as are necessary for the safe and

convenient enjoyment of them by the public for the purposes for which they are designed. It is fundamental that a municipality cannot, at least without express legislative authority, deprive itself by contract of any governmental powers conferred upon it for public purposes. Hence any authority to use the streets granted to defendant must be construed as being subject to the police power of the city over the streets, whatever may be the language of the grant. For example, if, by reason of increased traffic on the streets prescribed for the construction of the loop, or for any other reason, the use of those streets becomes inconsistent with the convenient use of the streets by the public, of a menace to the safety of the public, it would, in our opinion, be unquestionably within the police power of the city to enact an ordinance requiring the loop to be changed to some other location. In short, while a municipality cannot impair its contract under the guise of exercising its police power, it cannot surrender or barter away its police powers under the guise of making a contract." In *Flynn v. Water Co.*, 77 N. W. 38, the same court says: "The power of municipal authorities to contract in relation to a given matter does not carry with it by implication the power to make a contract, even with reference to such matter, which shall cede away, control, or embarrass their legislative or governmental powers, or render the municipality unable in the future to control any municipal matter over which it has legislative power." In a Michigan case—*City of Detroit v. Ft. Wayne & E. Ry. Co.*, 51 N. W. 688—it is said: "These powers are held in trust for the public benefit. They cannot be surrendered or delegated to private parties. All franchises granted or contracts made with reference to the use of the streets must be made not only with due regard to their lawful and proper use by others, but subject to the exercise by the municipality of the powers referred to." In further support of the principles announced by these precedents, see *Dill. Mun. Corp.* (4th Ed.) § 97; *Elliot, Roads & St.* §§ 760–858; *Rittenhouse v. City of Baltimore*, 25 Md. 336; *Henderson v. Railroad Co. (Utah)* 26 Pac. 288; *Telegraph Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454, 21 Am. St. Rep. 764; *Newton v. Mahoning Co.*, 100 U. S. 548, 25 L. Ed. 710; *State v. City of Hoboken*, 41 N. J. Law, 71; *Watson Seminary v. Pike County Court*, 149 Mo. 72, 50 S. W. 880, 45 L. R. A. 675; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018. If, therefore, for the purposes of the argument, we should assume Ordinance No. 409 to have been a reasonable and valid exercise of municipal authority, and to constitute a contract between the city and the railway company, it was still competent for the city to repeal or modify the privilege granted, whenever, in the exercise of a reasonable discretion, it should find that the convenience and safety of the public or the proper improvement of the street required it. As already suggested, and as has been often



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decided, this power may not be exercised unreasonably. And this is the extent to which most of the cases cited by appellant on this point may be claimed as authority,—for example: *City of Burlington v. Burlington St. Ry. Co.*, 49 Iowa, 144, 31 Am. Rep. 145; *Des Moines City Ry. Co. v. City of Des Moines*, 90 Iowa, 773, 58 N. W. 906, 26 L. R. A. 767; *North-Western Tel. Exch. Co. v. City of Minneapolis (Minn.)* 86 N. W. 74, 53 L. R. A. 175. Of the latter case, however, it should be said that, as determined upon rehearing, the decision was by a divided court; the holding of the majority that the city could not lawfully order the telephone poles removed, and the lines placed in an under ground conduit, being largely based upon an act of the legislature authorizing telegraph and telephone companies to carry their lines on poles planted in the highway. The burden is not cast upon the city to show that its exercise of legislative power is reasonable. The presumption is in favor of its reasonableness. *Paxson v. Sweet*, 13 N. J. Law, 196; *State v. Inhabitants of City of Trenton*, 53 N. J. Law, 132, 20 Atl. 1076, 11 L. R. A. 410. There is nothing in the record to overcome the presumption in favor of the action of the city council in repealing the ordinance. There is an important distinction to be drawn in speaking of municipal contracts,—a distinction which has not always been duly considered by courts and law writers, but it is nevertheless fundamental, and cannot, with safety, be disregarded. A municipal corporation may be said to possess a dual character. In one capacity it is a property holder, a mere business agency, and is charged with the management of the financial and business interests of the municipality. In another capacity it is an arm of sovereignty, and is charged with legislative and governmental powers. Contracts lawfully made by it in the first capacity are as obligatory and inviolable as contracts made between private individuals; but, in the absence of statutory authority, any contract or agreement, whether in the form of an ordinance or otherwise, which directly or indirectly surrenders or materially restricts the exercise of a governmental or legislative function or power, may at any time be terminated or annulled by the municipality; though, as we have already noted, such action may, under some circumstances, involve liability for compensation to persons who have acted upon faith of the validity of such contract. The power given to cities and towns to control their streets, direct their improvement, and regulate their use is a legislative power, and comes within the operation of the rule we have stated. *Lake Roland El. Ry. Co. v. City of Baltimore*, supra; *Rittenhouse v. City of Baltimore*, supra; *Telegraph Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454, 21 Am. St. Rep. 764; *Goszler v. Georgetown*, 19 U. S. 593, 5 L. Ed. 339; *Richmond County Gaslight Co. v. Town of Middletown*, 59 N. Y. 228; *Gaslight & Coke Co. v. City of Columbus*, 50 Ohio St. 65, 33 N. E. 292; *Bailey*

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*v. City of Philadelphia*, 167 Pa. 569, 31 Atl. 925, 46 Am. St. Rep. 691; *Springfield Fire & Marine Ins. Co. v. Village of Keesville*, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667. In the last case cited the rule is stated thus: "When we find that the power has relation to public purposes, and is for the public good, it is to be classified as governmental in its nature, and it appertains to the corporation in its political character. But when it relates to the accomplishment of private corporate purposes, in which the public is only indirectly concerned, it is private in its nature, and the municipal corporation, in respect to its exercise, is regarded as a legal individual." See, also, *City of New Haven v. New Haven & D. Railroad Co.*, 62 Conn. 252, 25 Atl. 316, 18 L. R. A. 256; *City of Wellston v. Morgan*, 59 Ohio St. 147, 52 N. E. 127. Applying this principle, it has been held that the city may defeat the title of its own grantee. *Brick Presbyterian Church Corp. v. City of New York*, 5 Cow. 540; *Stuyvesant v. City of New York*, 7 Cow. 588.

4. Appellant further argues that the act of the legislature legalizing its occupancy of the highway between Cedar Rapids and Marion served to vest the company with a legislative franchise for the operation of its road upon the location first selected, and which it continued thereafter to occupy. If this were to be conceded, it would not affect the question of the validity of Ordinance No. 409. It does, however, have a legitimate bearing upon the right which the city asserts under the present Ordinance No. 556 to require the company to remove its track to the middle of the street, and make it conform to the grade. We cannot agree that the legislative act has the effect to withdraw or except this company or its road from municipal control. The authority thus conferred was to construct and maintain a street railway. It did not vacate the highway, but simply made lawful an additional use of it. What is meant by a "street railway" in legislative phrase we have construed as referring "to the then known and used railways the rails of which were laid to conform to the surface of the street, and the construction of which did not of necessity exclude the public from the use of part of the street." *Freiday v. Transit Co.*, 92 Iowa, 191, 60 N. W. 656, 26 L. R. A. 246. While authorizing the use of the highway for this purpose, we think it must be held that such use was subject to the reserved power of the state by itself or by its local municipality to enact all reasonable measures to protect the general public in the use of the street for the primary purposes for which streets and highways are established. When, therefore, by the extension of the city limits, this portion of appellant's road was brought within the jurisdiction of municipal authority, it was neither more nor less than a street railway occupying a city street, and amenable to municipal regulation, like all other instrumentalities of its kind.

5. Appellant is in court not simply as the owner of a railway

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whose existence is authorized and legalized by the legislative act of 1880. It is also the assignee of the Thomson-Houston franchise, by the terms of which alone it may operate a system of electric street railways in Cedar Rapids. On obtaining possession of this franchise, it abandoned its steam motor, substituted electric motive power, and to all intents and purposes converted the motor line within the city into an integral part of the system which the Thomson-Houston purchase empowered it to install. Without resort to sophistry, the right of appellant to operate its First Avenue Line is not to be differentiated from its right to operate any other fraction of its system within the city limits. As the owner of the Thomson-Houston franchise, it holds its entire system within the city subject not only to the express conditions upon which the franchise was granted, but to the implied condition, which enters into every grant of privilege in the public streets, that such privilege is amenable to reasonable municipal regulation. Is there anything unreasonable in the demand of the city that the appellant be required to place its track in the middle of the street, and upon grade? Even though the company had never become the owner of the Thomson-Houston franchise, and was still operating its steam motor line on its original location, we see no reason why, under the principles established by the authorities cited, and under its general statutory power of regulation (Code, §§ 753-767), the city would not be authorized to require the track to be changed to the middle of the street, and made to conform to grade. The right which the company acquired by the statute was to operate a street railway, a term the meaning of which has already been discussed. The only novel or additional features introduced by said statute was the right of a company owning a city street railway to extend its line beyond the city limits in streets not less than 100 feet wide, and to operate such line by motor power. Subject to these express privileges, there is nothing in the language of the act which expressly or by fair implication modifies or abridges the right and power of the city to regulate this particular street railway exactly as it may regulate street railways in general. It needs no argument to demonstrate that the side or margin of the highway may be the most natural and convenient location of a street railway in a rural neighborhood, but it is even a plainer proposition that when, by increase of population, the city expands, and the rural highway becomes a city street, lined on either hand with residences or places of business, a track so located and used for the frequent passage of swiftly moving cars may become an intolerable inconvenience and source of peril, especially to those upon the immediate front of whose property it operates. We have no hesitancy in holding that the remedying of such condition by requiring the track to be removed to the middle of the street is a reasonable regulation, which the city may enforce. If we are to treat the

company as operating under the Thomson-Houston franchise, the reasons we have given for sustaining the order made by the city are no less applicable. All other lines in the city are in the middle of the street. As a matter of common observation, we know that such is the usual, ordinary, and most convenient location; and we may well conclude that upon purchasing the Thomson-Houston system, and assuming its obligation to construct an electric line from the business portion of the city over First avenue to the city limits, the company adopted the old motor track as a temporary expedient only, and that as such the city has permitted its use. It may justly be said that, when reduced to its lowest terms, there is no real dispute between the parties as to the propriety of placing the tracks in the middle of the street. The railway company not only professes a desire to make the change, but insists upon its legal right to do so under Ordinance No. 409. The city desires the change, but insists upon its right to make the order independent of said ordinance. When the discussion is shorn of all nonessentials and side issues, we find the real question to be, not whether the tracks shall be moved to the middle of the street, but whether, having so moved its tracks, the company may occupy its new location under the terms of Ordinance No. 409. This, as we have seen, means the yielding to the company of the exclusive possession of the 20-foot strip in the middle of the street, the exclusion of the general public therefrom, and the exemption of the company from contributing to the expense of paving the street. Whether the city possesses the right, under any circumstances, to thus carve out and withdraw from the public use a part of the street for the benefit of the railway company we need not decide. We have already held that the ordinance which attempted so to do has been duly repealed, and that the company acquired no such vested right thereunder as can now be asserted against the city or the general public. There is nothing unreasonable in requiring the company to put its tracks at grade, and to pave the ground that it occupies in the street wherever such paving is duly ordered. The statute contemplates it. Code, §§ 834, 835. Such construction gives the general public unrestricted access to and use of the entire street from curb to curb, subject to the right of the company to the proper use of its track. With rare exceptions, it is the universal plan adopted wherever street railway systems exist. In the absence of express qualification, it is the kind of construction which the law presumes to be intended. *Freiday v. Transit Co.*, supra. Moreover, the Thomson-Houston franchise required the rails to be so laid as not to interfere with the safe crossing of the tracks by vehicles, and that requirement is as binding upon the present company as it was upon its grantor. The city was plainly well within the limit of its authority in ordering the track laid at grade and in requiring

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the company to pave whenever such improvement is properly ordered upon the street occupied by it.

6. The decree of the district court as it appears in the record is not entirely clear as to the time when and the manner in which the railway company shall be required to pave. We think that, to avoid all ambiguity and uncertainty, the form of the decree should be so modified that the defendant shall be required to pave only so far as the street occupied by it is now paved, or may hereafter be duly ordered paved, and that the material used and the manner of making such improvement shall be as provided in the ordinances or resolutions of the council providing therefor. The modified decree may, at the option of either party, be entered in this court.

The additional relief asked by the city's amendment to its cross-petition concerning the company's line between Twentieth street and the city limits was properly dismissed by the district court. When such improvement is deemed necessary, the city should order it in the usual manner by its constituted authorities, and we cannot assume in advance that it will not be observed by the company.

With the modification above indicated, the decree of the district court is affirmed.

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(*Supreme Court of Washington, Oct. 15, 1902.*)

[70 Pac. Rep. 484.]

**Eminent Domain—Review by Certiorari.**

Const. art. 1, § 16, provides that whenever property is sought to be condemned the question whether the contemplated use is a public one shall be a judicial question, to be determined without regard to any legislative assertion that the use is public. Article 4, § 4, declares that the supreme court shall have power to issue writs of certiorari in the exercise of its appellate revisory jurisdiction: *held* that, since no right of appeal was given by statute to review the question of public use in condemnation proceedings, the supreme court had jurisdiction to review by certiorari.

**Same—Right of Way—Jurisdiction.**

The superior court has jurisdiction of a proceeding by a street railway company for the condemnation of certain land for a right of way.

**Same—Same—Streets.**

Where property sought to be condemned had been dedicated as a street but had never been improved, and could not be used as a street without being planked over and filled in to an elevation above the rise of the tides, which a railroad company seeking to condemn the same was required by city ordinance to do as a condition precedent to its right, the place sought to be condemned was not a street within Laws 1899, p. 147, granting to street railway companies the power of eminent domain, but declaring that such right should not be exercised with respect to public roads or streets.

**Same—Abutters—Damages—Elements.**

Where a property owner's easements of light, air, and access will be injuriously affected by the construction of a trestle and bridge in front of the same by a street railway company, such easements constitute property, compensation for the taking of which must be ascertained by a jury, and paid to the owner, before construction of the improvement.



State *ex rel.* Smith *v.* Superior Court of King County

Certiorari by the state, on the relation of Charles B. Smith, against the superior court of King county, Arthur E. Griffin, judge, to review a judgment in favor of the Seattle Electric Company in condemnation proceedings. Judgment affirmed.

Moore & Farrell, for relator.

Piles, Donworth & Howe, for respondent.

ANDERS, J. This is an original application to this court for a writ of certiorari to review a judgment of the superior court of King county in a condemnation proceeding instituted by the Seattle Electric Company. It appears from the record that the relator, Charles B. Smith, is the owner of lots 5 and 6, except the west 27 feet thereof, and lots 1, 2, 7, and 8 of block 21, of D. S. Maynard's plat of the town (now city) of Seattle, and that these lots abut upon Fourth avenue south, a dedicated and platted street of said city. This avenue has never been improved, and cannot be used for the purposes of a public street in front of the relator's lots, by reason of the fact that it is there merely a vacant strip of tide land, 66 feet in width, over which the tide regularly and freely ebbs and flows. The Seattle Electric Company is a corporation authorized by law to construct and operate electric and other railroads in the state of Washington. This corporation is engaged in the construction of a street railway in said Fourth avenue south, under and in pursuance of Ordinance 7015 of said city. When the construction of the company's line of railway had reached that portion of the street lying adjacent to the relator's lots, he applied for and obtained a restraining order in an action brought by him in the superior court against the company for an injunction. At the hearing of this application for a temporary injunction the superior court made an order denying such injunction on condition that the company give a bond in the full amount of the damages which he claimed he would sustain by the building of the railway in front of his premises. The required bond was given, and the company was about to continue its work upon the street. When the relator herein applied to this court for a writ of certiorari, which was granted on the ground that a bond was not proper in such cases, as, under the constitution of the state, private property may not be taken or damaged for public or private use without first making just compensation therefor to the owner. *State v. Superior Court of King County*, 26 Wash. 278, 66 Pac. 385. Thereafter the company, on December 20, 1901, instituted a proceeding under the statute relating to eminent domain for the purpose of ascertaining the amount of compensation that should be made to the relator herein on account of the building of the railway line and roadway which the company was constructing, and which the city required it to construct, in accordance with the provisions of Ordinance 7,015. The Tucker-Hanford Company was made a party to the condemnation proceeding for the

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reason that it owns a part of lots 5 and 6, above described; but it has not contested the condemnation, and is not a party to this application for certiorari. A hearing was had in the superior court, after notice to all parties interested, on the company's petition, and that court found that all the provisions of the statute had been complied with by the petitioner, and concluded and adjudged that the contemplated use for which the trestle and bridge is proposed to be constructed is really a public use, that the public interest required the prosecution of the enterprise, and that the property and easements sought to be appropriated and injuriously affected by the construction and maintenance of the trestle and bridge are required and necessary for the purposes of the enterprise. After filing its findings of facts and conclusions of law and entering the judgment, as above set forth, the court then ordered a jury to be summoned to determine the amount of compensation to be paid to the owners of the premises for the taking and injuriously affecting said premises and easements by the petitioner, for the purposes of the said enterprise, irrespective of any benefit from any improvement proposed by the petitioner in that proceeding. From this order the relator appealed, and asked the superior court to stay the proceedings until his appeal could be heard in this court, which was accordingly done. Thereupon the petitioner, the Seattle Electric Company, applied to this court for a writ of mandate in the nature of a procedendo commanding the superior court to proceed with the trial of the case before a jury to determine the amount of damages, which application was granted, after a hearing of all parties, and the writ issued as prayed for. This court, in that proceeding, decided that there is no statute in this state authorizing an appeal from the judgment of the superior court upon the question of public use and necessity in a condemnation proceeding, the act of 1901 (Laws 1901, p. 213) purporting to authorize such appeal being unconstitutional and void. See *State v. Superior Court of King County* (Wash.) 68 Pac. 957. Before the hearing was had on the petition for condemnation, the relator herein (respondent there) demurred to the petition on the grounds: (1) That said superior court had no jurisdiction of the particular subject-matter of the proceeding; (2) that the petitioner had no legal capacity to prosecute or maintain said proceeding; and (3) that the petition did not state facts sufficient to constitute a cause of action, or to entitle it to any relief. This demurrer was overruled, and an exception noted. The relator, Smith, now seeks by certiorari to review the action of the superior court in overruling the demurrer to the petition of the Seattle Electric Company, and in entering the interlocutory judgment declaring the public use and necessity, and ordering a jury to assess the damages; and he alleges that the court erred in overruling the demurrer and entering the judgment and order above specified. The respondent

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moves to quash the alternative writ heretofore issued and dismiss the proceeding for certiorari, or, if it be entertained, that the order of the superior court be affirmed.

It is insisted on behalf of the respondent that, inasmuch as there is no statute providing for an appeal from the judgment of the superior court determining the question of public use and necessity, the constitutional and statutory provisions are sufficiently complied with if that question is judicially determined by the superior court, and that such determination may not be reviewed by certiorari. But this same point was made in the recent case of *Seattle & M. R. Co. v. Bellingham Bay & E. R. Co.*, 69 Pac. 1107, and was there decided adversely to the contention of the respondent after a careful consideration by this court. In that case the superior court adjudged that the use for which the property in question was sought to be condemned was a public use, and that the public interest required the prosecution of the enterprise, and the respondent in that proceeding applied to this court for a writ of certiorari to review the judgment of the superior court. The petition for the writ was demurred to for the alleged reasons that this court had no jurisdiction to issue the writ, and that the application did not state facts sufficient to constitute a cause of action. After quoting section 16 of article 1 of our constitution, which defines and limits the right of eminent domain, and section 4 of article 4, defining the jurisdiction of the supreme court, and reviewing its former decisions bearing upon the questions under consideration, this court observed: "It having been adjudged that no review on appeal of the question of public use and interest involved in the exercise of eminent domain proceedings now exists, it follows that the writ of certiorari may be issued to bring up the record for review in the proceedings for appropriation of the right of way through petitioner's real property. The application for the writ states sufficient cause for its issuance." That case is directly in point here, and is decisive of the question of the power and authority of this court to review the decision of the superior court in condemnation proceedings upon the subject of public use and necessity. It appears clear to us that the petition for condemnation stated sufficient facts to constitute a cause of action, as it alleged all the facts required by the statute to be stated in such proceedings. And it is equally clear that the superior court had jurisdiction of the particular subject-matter of the proceedings, and that the petitioner therein was vested with legal capacity to prosecute said proceedings. In the year 1899 the power of eminent domain was granted to electric railway corporations by an act of the legislature. Laws 1899, p. 147. But a proviso in section 1 of said act declares "that said right of eminent domain shall not be exercised with respect to any residence or business structure or structures, public road or street"; and it is claimed by the learned counsel for the relator that the Seattle

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Electric Company is endeavoring to appropriate a public street for the purposes of its railway, in contravention of the above quoted provision of the statute; or that it is at least undertaking to build an elevated railway in a public street of the city, which it has no right to do, in the absence of direct legislative sanction. But we do not think that the company is either attempting to condemn and appropriate to its own use a street, or to construct an "elevated railroad" on a street, within the meaning of that phrase, as understood in localities where such railways are in common use. An elevated railroad, properly speaking, is one which is placed above the surface of the street which is used by the general public; but such is not the character of the structure which the company is required by the city to erect. Fourth avenue south, at the point in question, is a street in name only, and it became such, as we have said, by the mere act of dedication. It can never be used by the public as a street until it is filled in or planked over at an elevation above the rise of the tides. The city, by ordinance, granted to the electric company the privilege of laying its tracks in this platted and dedicated street,—as it was clearly empowered to do by law,—but it required the company, as compensation for such privilege, to construct a plank roadway or bridge (designated in the record as a "trestle and bridge") not less than 22 feet in width, and upon a grade and at a height specified in the ordinance, and to maintain the same for the use of the public as a street as well as for its railroad tracks. It appears from the findings of fact made by the lower court that the natural surface of the ground in Fourth avenue south in front of the relator's lots is 33½ feet below the present grade of Jackson street, the nearest traveled street, and could not be traveled either by pedestrians or teams; that there is now no roadway or structure of any kind in that part of said avenue; and that the city of Seattle has never established any grade for said avenue in those portions of said avenue which are to be occupied by said trestle and bridge, or taken any steps for the construction of a roadway therein, except by the passage of said Ordinance No. 7,015. And it would seem, from the record in this case, that what the company is really seeking to do, and what the city requires it to do, under its franchise, is, not to condemn and appropriate a street, but virtually to make a street where none has heretofore existed. It is claimed, however, by the relator that no necessity for taking or injuring his property was shown by the company in the superior court. But that question was determined by the court, in the light of the evidence adduced by the respective parties, in favor of the company, and we see no reason for disturbing its judgment. The electric company does not seek to appropriate the corpus of the relator's property, but it is claimed that relator's easements of light, air, and access will be injuriously affected by the building of the proposed

## Potter v. Leviton

structure. Such easements are property, and cannot be taken for public use "without just compensation having been first made, or paid into court for the owner"; but the amount of such compensation must be ascertained by a jury, unless a jury be waived, in the manner provided by law.

The order and judgment is affirmed, at the cost of the relator.

REAVIS, C. J., and DUNBAR, FULLERTON, and MOUNT, JJ., concur.

POTTER v. LEVITON *et al.*

(*Supreme Court of Illinois, Oct. 25, 1902.*)

[64 N. E. Rep. 1029.]

## Accident on Track—Variance.

Where a declaration alleges in one count that plaintiff was on the east track of the street railway company when he was hurt, and in another that he was on the west track of such company, and the evidence shows that he was not on either track, but was between the two, and was within the space which the car running on the rails occupied as it passed, he was on the track, within the meaning of the allegation of the declaration.

## Appeal for Delay—Damages.

Where the point raised on appeal is so clearly untenable and devoid of merit that it appears that the record was brought to the court on appeal for delay only, damages will be assessed against plaintiff in error to an amount not exceeding 10 per cent. of the judgment.

## Error to appellate court, First district.

Action by Frank Leviton, by his next friend, against Edwin A. Potter, as receiver, etc. Judgment for plaintiff was affirmed by the appellate court (101 Ill. App. 544), and defendant brings error. Affirmed.

Frank W. Welch, for plaintiff in error.

Roy O. West, J. R. Becket, and Kitt Gould, for defendant in error.

CARTER, J. Frank Leviton, suing by his next friend, recovered a judgment against the plaintiff in error in the circuit court of Cook county for a personal injury caused by the running of a street car against him at the public crossing of Michigan avenue and 111th place, and the appellate court affirmed the judgment.

The plaintiff, a boy of 3½ years, was attempting to cross Michigan avenue from east to west when he was struck by defendant's car running south. The only ground for reversal urged here by plaintiff in error is that the trial court erred in refusing to instruct the jury to find the defendant not guilty, and the only reason given in support of the contention that the court should have so instructed the jury is that there was no evidence (as it is claimed) that the boy, when he was struck, was on the railway track of the defendant, as alleged



*Potter v. Leviton*

in the declaration. The declaration, in some of its counts, alleged that he was at the time lawfully on the east track, and in others that he was lawfully on the west track; and counsel says that the evidence shows that he was not on either track, but was between the two tracks. There is no evidence how far apart the tracks were, nor what the space was between the tracks that was not in fact occupied by one track or the other. If he was within the space which the car, running on the rails, occupied as it passed, we are of the opinion that he was on the track, within the meaning of the allegation of the declaration. In *Delaware & H. Canal Co. v. Village of Whitehall*, 90 N. Y. 21, the term "track" was given a broader signification than this. But without attempting any precise definition, we are satisfied that there was no such variance between allegation and proof as to prevent recovery under the pleadings. Besides, one or more of the witnesses testified that the boy was crossing the street and was on the track of the railway when he was struck, and this fact, if necessary to a recovery, has been conclusively established by the judgment of the appellate court. Lack of ordinary care could not, because of his tender years, be imputed to him, and there was abundant evidence of negligence on the part of the servants of the company or of its receiver. These questions, however, are not controverted by counsel. The one raised is so clearly untenable and devoid of merit that it must be held, as insisted by counsel for defendant in error, that the record was brought to this court for delay only. It therefore becomes our duty, under the statute, to assess damages against plaintiff in error, not exceeding 10 per cent. of the amount of the judgment of the circuit court.

The judgment of the appellate court will be affirmed, and, in addition to the judgment for costs, the clerk will enter judgment against the plaintiff in error, in favor of defendant in error, for 5 per cent. of the amount of the judgment recovered in the circuit court. Judgment affirmed.





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One who walks along street on or too near railroad track without necessity is guilty of contributory negligence barring recovery for injury from an engine.

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Question for jury where street car collided with plaintiff's vehicle while his attention was occupied by another car.  
*Plant v. Heraty (Mich.)*, p. 358, vol. 28 (5 R R R).

Sleeping on the ends of cross-ties.

*Hughes v. Louisville & N. R. Co. (Ky.)*, p. 610, vol. 25 (2 R R R).

Sufficiency of evidence of such wanton and gross negligence as will render unavailable a plea of contributory negligence, in action for killing person on track in railroad yard.

*King v. Illinois Cent. R. Co. (C. C. A.)*, p. 875, vol. 26 (3 R R R).

Sufficiency of evidence where person was injured by train seen by him before attempting to cross tracks.

*Alexander v. Louisville & N. R. Co. (Ga.)*, p. 572, vol. 26 (3 R R R).

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- Walking on track.  
 Denver & R. G. R. Co. *v.* Buffehr (Colo.), p. 762, vol. 27 (4 R R R).
- Declarations of motorman as *res gestæ*.  
 Sample *v.* Consolidated Light & Ry. Co. (W. Va.), p. 380, vol. 24 (1 R R R).
- Defendant's negligence in running into wagon backed at right angles to curb in delivering goods was a question for jury.  
 Fenner *v.* Wilkesbarre & W. V. Traction Co. (Pa.), p. 617, vol. 25 (2 R R R).
- Degree of care due licensee.  
 Law *v.* Missouri, K. & T. Ry. Co. of Texas (Tex.), p. 582, vol. 25 (2 R R R).
- Duty of engineer to look out for children on track.  
 Texas & P. Ry. Co. *v.* Harby (Tex.), p. 602, vol. 25 (2 R R R).
- Duty of trainmen to keep look-out when operating train on one side of company's bridge while the other side is used by pedestrians and horsemen.  
 Kentucky & I. Bridge Co.'s Receivers *v.* Montgomery (Ky.), p. 405, vol. 25 (2 R R R).
- Duty of trainmen to look out when shunting cars on wharf.  
 Baltimore & O. R. Co. *v.* Charvat (Md.), p. 621, vol. 25 (2 R R R).
- Evidence as to effect of train striking person while he is standing.  
 Gulf, etc., Ry. Co. *v.* Matthews (Tex.), p. 580, vol. 24 (1 R R R).
- Existence of custom on part of trainmen to shunt cars on to coal company's wharf without warning could not defeat recovery by employee of the latter company for injuries, unless he had knowledge of such custom.  
 Baltimore & O. R. Co. *v.* Charvat (Md.), p. 621, vol. 25 (2 R R R).
- Expert testimony as to whether person was walking, standing or lying on track.  
 Gulf, etc., Ry. Co. *v.* Matthews (Tex.), p. 580, vol. 24 (1 R R R).

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- Failure to give signals where accident was not at crossing.  
 San Antonio & A. P. Ry. Co. *v.* Gray (Tex.), p. 828, vol. 25 (2 R R R).
- Failure to stop train after discovery of plaintiff's peril.  
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- Instructions as to care due employee on track after discovery of peril.  
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- Instructions as to duty to take a different route objectionable because argumentative.  
 Lumsden *v.* Chicago, etc., Ry. Co. (Tex.), p. 806, vol. 25 (2 R R R).
- Instructions erroneous as unduly emphasizing a particular defense.  
 Lumsden *v.* Chicago, etc., Ry. Co. (Tex.), p. 806, vol. 25 (2 R R R).
- Issues under the pleadings.  
 Denver & R. G. R. Co. *v.* Buffehr (Colo.), p. 762, vol. 27 (4 R R R).
- Liability for injury to mail carrier, sufficiency of evidence.  
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- Liability for negligence of employee in running against person standing near depot and pushing him under car.  
 Missouri, K. & T. Ry. Co. of Texas *v.* Edwards (Tex.), p. 430, vol. 25 (2 R R R).
- Liability for negligence of engineer in failing to see child on railroad bridge.  
 Texas & P. Ry. Co. *v.* Harby (Tex.), p. 602, vol. 25 (2 R R R).
- Liability for negligence of person permitted to move cars on side track.  
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- Motorman not chargeable with negligence in failing to apprehend that boy will jump from wagon and go upon track.  
 Baier *v.* Camden & S. Ry. Co. (N. J.), p. 911, vol. 26 (3 R R R).

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Negligence a question for jury in action for death of trespasser.

*Martin v. Chicago & N. W. Ry. Co. (Ill.), p. 718, vol. 24 (1 R R R).*

Negligence concurring with erroneous conduct induced by fear.

*Gulf, C. & S. F. Ry. Co. v. Bryant (Tex.), p. 952, vol. 24 (1 R R R).*

Negligence in failing to stop car, instruction not warranted by pleading.

*Indianapolis St. Ry. Co. v. Taylor (Ind.), p. 588, vol. 25 (2 R R R).*

Negligence of engineer after discovering plaintiff's peril.

*Edwards v. Chicago & A. Ry. Co. (Mo.), p. 333, vol. 25 (2 R R R).*

Negligence of engineer in failing to see child in time to avoid accident.

*Texas & P. Ry. Co. v. Harby (Tex.), p. 602, vol. 25 (2 R R R).*

Negligence of trainmen in shunting cars was a question for the jury where employee of coal company unloading car on its wharf was injured.

*Baltimore & O. R. Co. v. Charvat (Md.), p. 621, vol. 25 (2 R R R).*

Negligence, question for jury in action for injury to wagon caused by trolley car slipping backward down grade.

*Campbell v. Consolidated Traction Co. (Pa.), p. 69, vol. 24 (1 R R R).*

Parent injured in rescuing child.

*San Antonio & A. P. Ry. Co. v. Gray (Tex.), p. 828, vol. 25 (2 R R R).*

Person injured by standing between track was on track within meaning of allegation of declaration.

*Potter v. Leviton (Ill.), p. 767, vol. 28 (5 R R R).*

Presumption of negligence from accidents on street railway track.

*West Chicago St. R. Co. v. Petters (Ill.), p. 612, vol. 25 (2 R R R).*

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Presumption of negligence from injury to wagon, caused by trolley car slipping backward down grade.

*Campbell v. Consolidated Traction Co. (Pa.), p. 69, vol. 24 (1 R R R).*

Presumption that pedestrian will avoid danger from train.

*Humphreys v. Valley R. Co. (Va.), p. 649, vol. 28 (5 R R R).*

Proximate cause of injury where runaway horse ran over car tracks negligently constructed, and upset vehicle.

*Gray v. Washington Water Power Co. (Wash.), p. 598, vol. 25 (2 R R R).*

Proximate cause, question for jury where there was negligence in moving train and erroneous conduct induced by fear.

*Gulf, C. & S. F. Ry. Co. v. Bryant (Tex.), p. 952, vol. 24 (1 R R R).*

Question for jury whether prospective passenger walking on bridge, was a trespasser or licensee.

*Chicago Terminal Transfer R. Co. v. Gruss (Ill.), p. 704, vol. 28 (5 R R R).*

Question for jury whether street car tracks were negligently constructed, in action for injury alleged to have been caused thereby.

*Gray v. Washington Water Power Co. (Wash.), p. 598, vol. 25 (2 R R R).*

Question of defendant's negligence was for the jury.

*Illinois Cent. R. Co. v. Jernigan (Ill.), p. 535, vol. 28 (5 R R R).*

Question of willfulness or wantonness after discovery of person's peril was for the jury.

*Chicago Terminal Transfer R. Co. v. Gruss (Ill.), p. 704, vol. 28 (5 R R R).*

Speed in violation of ordinance as negligence.

*Kansas City Suburban Belt Ry. Co. v. Herman (Kan.), p. 577, vol. 25 (2 R R R).*

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buggy against train after engine had passed.

*Pedigo v. Louisville & N. R. Co. (Ky.)*, p. 631, vol. 26 (3 R R R).

Sufficiency of evidence of knowledge of engineer that deceased was asleep on track.

*Alabama G. S. R. Co. v. Hamilton (Ala.)*, p. 631, vol. 28 (5 R R R).

Sufficiency of evidence of negligence after discovery of peril.

*Humphreys v. Valley R. Co. (Va.)*, p. 649, vol. 28 (5 R R R).

Sufficiency of evidence of negligence on part of motorman who saw that deaf wheelman did not regard signals from his companions.

*Bedell v. Detroit, Y. & A. A. Ry. (Mich.)*, p. 715, vol. 28 (5 R R R).

Sufficiency of evidence of such wanton and gross negligence as will render unavailable a plea of contributory negligence in action for killing person on track, in railroad yard.

*King v. Illinois Cent. R. Co. (C. C. A.)*, p. 875, vol. 26 (3 R R R).

Sufficiency of evidence of wantonness and willfulness where person asleep on track is killed by train.

*Alabama G. S. R. Co. v. Hamilton (Ala.)*, p. 631, vol. 28 (5 R R R).

Sufficiency of evidence to show false imprisonment of boy injured on track.

*Ollet v. Pittsburgh, etc., Ry. Co. (Pa.)*, p. 508, vol. 24 (1 R R R).

Sufficiency of evidence to show that deceased was killed by train.

*Martin v. Chicago & N. W. Ry. Co. (Ill.)*, p. 718, vol. 24 (1 R R R).

Uncertainty as to cause of death of person found near railroad track warranted a peremptory instruction for defendant.

*Hughes v. Louisville & N. R. Co. (Ky.)*, p. 610, vol. 25 (2 R R R).

Wilfulness in failing to stop car after plaintiff was under

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it, instruction not warranted by facts therein stated.

*Indianapolis St. Ry. Co. v. Taylor (Ind.)*, p. 588, vol. 25 (2 R R R).

Wilfulness, instruction not warranted by pleading.

*Indianapolis St. Ry. Co. v. Taylor (Ind.)*, p. 588, vol. 25 (2 R R R).

Wilfulness of motorman in failing to stop car, instruction not warranted by evidence.

*Indianapolis St. Ry. Co. v. Taylor (Ind.)*, p. 588, vol. 25 (2 R R R).

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Joinder of master and servant as defendant in action for death resulting from negligence of servant.

*Cincinnati, etc., Ry. Co. v. Cook (Ky.)*, p. 321, vol. 25 (2 R R R).

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*Atlanta, K. & N. Ry. Co. v. Wilson (Ga.)*, p. 610, vol. 27 (4 R R R).

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Admissibility of question constituting collateral attack on judgment on eminent domain proceedings.

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**ADJACENT LANDS.**

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*Right of Way.*

Duty to maintain railing where right of way over path has been acquired by prescription.

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Insufficiency of evidence to show adverse possession by railroad.

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Possession of railroad after failure to comply with conditions.

*Southern California R. Co. v. Slauson* (Cal.), p. 520, vol. 25 (2 R R R).

**ADVERSE USER.**

Commencement of adverse user as the basis for a prescriptive right to overflow land.

*Kelly v. Pittsburgh, C., C. & St. L. Ry. Co.* (Ind.), p. 547, vol. 25 (2 R R R).

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**APPEALS.**

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Assignment of error will not be considered when defendant's motion for order directing verdict nor the ruling thereon were not made part of the record.

*Bonham v. Citizens' St. R. Co.* (Ind.), p. 787, vol. 25 (2 R R R).

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Corrections of errors in appellate record.

*Camp v. Wabash R. Co.* (Mo.), p. 746, vol. 25 (2 R R R).

Judgment in condemnation proceedings will not be disturbed when evidence is conflicting, premises viewed by jury, damages not grossly inadequate.

*Guyer v. Davenport, R. I. & N. W. Ry. Co.* (Ill.), p. 667, vol. 25 (2 R R R).

**Review.**

Assignment of error making release of liability for injury to employee basis of special instruction.

*Mexican Cent. Ry. Co. v. Wilder* (C. C. A.), p. 493, vol. 26 (3 R R R).

Award in condemnation of land for extension of street across railroad.

*Chicago & N. W. Ry. Co. v. City of Morrison* (Ill.), p. 807, vol. 24 (1 R R R).

Contention that franchise was defective without specifying defect, in action on contract to pay plaintiff a certain sum after railway is constructed to certain point.

*Los Angeles Traction Co. v. Wilshire* (Cal.), p. 695, vol. 24 (1 R R R).

Contributory negligence, requested instruction where one could not be given without giving undue prominence to that defence.

*International & G. N. R. Co. v. Branch* (Tex.), p. 230, vol. 26 (3 R R R).

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Discretion of court to enjoin construction of electric railway until payment of compensation.

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Estoppel to object on appeal that proper measure of damages was not considered, in

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- action for damages to live stock in transit.  
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- Excessive verdict.  
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- Excessive verdict where unlawful appropriation by telegraph company.  
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*Conness v. Indiana, I. & I. R. Co.* (Ill.), p. 260, vol. 24 (1 R R R).
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- Punitive damages allowed for personal injuries.  
*Louisville & N. R. Co. v. Croan* (Ky.), p. 509, vol. 28 (5 R R R).
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- Right of appeal where refusal to enjoin eminent domain proceedings where right to compensation has been denied.  
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- When defense that complainant in a bill to restrain enforcement of municipal ordinances as impairing contract obligation will not be recognized on appeal, there being an adequate remedy at law.

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- City of Detroit v. Detroit Citizens' Street Ry. Co.* (U. S.), p. 851, vol. 25 (2 R R R).
- When judgment in action brought by person dissatisfied with decision of railroad commissioner may be appealed from.  
*Railroad Commission of Texas v. Weld* (Tex.), p. 955, vol. 25 (2 R R R).
- When report of master cannot be set aside on question of fact.  
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- Where there is a substantial conflict of evidence, the verdict will not be disturbed on appeal.  
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- Would not lie from decision of lower court from allotment of county surveyor to landowner for destruction of ditch.  
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- Effect of act of police officers in changing the charge in action for false imprisonment of person for using car as refuge from weather.  
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- Effect of plaintiff being found guilty of another charge in action for false imprisonment.  
*Texas & P. Ry. Co. v. Cope* (Tex.), p. 906, vol. 26 (3 R R R).
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Texas & P. Ry. Co. *v.* Parker (Tex.), p. 906, vol. 26 (3 R R R).

False imprisonment of person using car as refuge from weather, scope of employment.

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Liability for delay in landing passenger's effects, under stipulation in ticket providing that voyage should end at place of anchorage.

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Sufficiency of evidence to show company's knowledge that passenger's trunk contained merchandise.

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*Chicago & N. W. Ry. Co. v. Calumet Stock Farm* (Ill.), p. 162, vol. 24 (1 R R R).

Pledge, effect of subsequent delivery of bill where property had been seized at suit of pledgee's creditor.

*Cameron v. Orleans & J. Ry. Co., Limited* (La.), p. 829, vol. 26 (3 R R R).

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*First Nat. Bank of Pullman v. Northern Pac. Ry. Co.* (Wash.) p. 4, vol. 26 (3 R R R).

Shipment beyond destination named in, after arrival at place named in bill of lading. *Missouri, K. & T. Ry. Co. v. Mazzie* (Tex.), p. 950, vol. 25, (2 R R R).

Under commercial usage carrier should deliver articles only on productions of bill of lading though it names the consignee.

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*Cushing v. Chapman* (Mo.), p. 852, vol. 26 (3 R R R).

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Estoppel of stockholders to contend that street railway bonds are invalid.

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Admissibility of evidence of special agreement to pay freight, entered into after delivery of bill of lading.

Montpelier & W. R. R. Co. *v.* Macchi (Vt.), p. 249, vol. 28 (5 R R R).

Admissibility of evidence that when freight was to be prepaid it was custom to indicate it on bill of lading, though it appeared that defendant had never before shipped to prepay station.

Montpelier & W. R. R. Co. *v.* Macchi (Vt.), p. 249, vol. 28 (5 R R R).

Application of statute fixing rates where reorganization by purchaser at foreclosure sale. Com'r of Railroads *v.* Grand Rapids & I. Ry. Co. (Mich.), p. 665, vol. 26 (3 R R R).

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Conversion of goods, sufficiency of evidence.

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Southern Ry. Co. *v.* Allison (Ga.), p. 909, vol. 27 (4 R R R).

Evidence that defendant had no title to consign goods after they were placed in car was admissible, as bearing on improbability of defendant promising to pay freight on another's goods.

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tion, and delivers to terminal carrier in damaged condition. Missouri, K. & T. Ry. Co. *v.* Mazzie (Tex.), p. 950, vol. 25 (2 R R R).

**Limiting Liability.**

Authority of agent to ship goods carries with it authority to accept bill of lading and enter into contract limiting carrier's liability.

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Burden of proving that delay was caused by carrier's negligence where carrier had contracted against liability for delay not caused by negligence.

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Conclusiveness of foreign judgment regardless of whether stipulation against liability was void or not under laws of state where action is brought.

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Effect of contract limiting liability within a state where goods are shipped from without, in view of Interstate Commerce Act regulating uniform rates, equal facilities, continuous passage, etc. Hughes *v.* Pennsylvania R. Co. (Pa.), p. 925, vol. 25 (2 R R R).

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*Mears v. New York, etc., R. Co. (Conn.)*, p. 668, vol. 26 (3 R R R).

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*Mears v. New York, etc., R. Co. (Conn.)*, p. 668, vol. 26 (3 R R R).

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Rev. St. U. S., secs. 3100, 3102, and 1 Supp. Rev. St. U. S. 1891, pp. 294, 540, does not entitle carrier to subrogation to lien of government on account of duties paid by him.

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Right of owner to sue for injury to horse where his agent was named as both consignor and consignee in contract of shipment.

Southern Ry. Co. *v.* Jones (Ala.), p. 725, vol. 24 (1 R R R).

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Under count seeking recovery against railroad company as voluntary bailee of goods destroyed before delivery to consignee, burden of proof was on plaintiff to show negligence alleged.

Frederick *v.* Louisville & N. R. Co. (Ala.), p. 43, vol. 26 (3 R R R).

Under Michigan statute providing that a penalty may be recovered by party aggrieved in case of refusal of carrier to take and transport passenger or property, the shipper, and not a connecting carrier to whom freight is consigned, is the party to sue to recover penalty.

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McChord *v.* C. & O. R. Co. (U. S.), p. 298, vol. 24 (1 R R R).

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**CARRIERS OF LIVE STOCK.**

*See Carriers of Freight.*

*Carriers of Goods.*

*Common Carriers.*

*Connecting Carriers.*

*Interstate Commerce.*

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- Liability to separate penalty for each animal under N. Car. Code providing penalty for refusing to ship.  
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## Limiting Liability.

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Normile *v.* Oregon R. & Nav. Co. (Ore.), p. 306, vol. 28 (5 R R R).

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Duty to feed stock during delay.

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O'Malley *v.* Great Northern Ry. Co. (Minn.), p. 180, vol. 27 (4 R R R).

Plaintiff, having sued defendant as common carrier, on its common-law liability, and a valid contract limiting its liability to a stipulated value appearing, there is a fatal variance.

Normile *v.* Oregon R. & Nav. Co. (Ore.), p. 306, vol. 28 (5 R R R).

Power to limit liability.

O'Malley *v.* Great Northern Ry. Co. (Minn.), p. 180, vol. 27 (4 R R R).

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Mears *v.* New York, etc., R. Co. (Conn.), p. 668, vol. 26 (3 R R R).

Shipper agreeing to care for stock.

Chicago, etc., R. Co. *v.* Schuldt (Neb.), p. 584, vol. 28 (5 R R R).

Whether stipulation was reasonable.

O'Malley *v.* Great Northern Ry. Co. (Minn.), p. 180, vol. 27 (4 R R R).

Negligence question for jury in action for injury to race horse in transit.

Louisville & N. R. Co. *v.* Harned (Ky.), p. 115, vol. 24 (1 R R R).

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O'Malley *v.* Great Northern Ry. Co. (Minn.), p. 180, vol. 27 (4 R R R).

Notice of injury, validity of stipulation.

Southern Ry. Co. *v.* Adams (Ga.), p. 912, vol. 27 (4 R R R).

Notwithstanding stipulation in bill of lading that shipper shall unload stock, carrier undertaking to do this without notice to shipper is liable for negligence therein.

Normile *v.* Oregon R. & Nav. Co. (Ore.), p. 306, vol. 28 (5 R R R).

Opinion evidence as to injury to cattle in transit.

St. Louis, I. M. & S. Ry. Co. *v.* Jacobs (Ark.), p. 314, vol. 27 (4 R R R).

Plaintiff, having sued defendant on its liability as a common carrier, cannot recover on its liability as warehouseman.

Normile *v.* Oregon R. & Nav. Co. (Ore.), p. 306, vol. 28 (5 R R R).

Railway company contracting to ship cattle from its own and connecting line to certain point was liable for injury occurring on connecting line.

Texas & P. Ry. Co. *v.* McCarty (Tex.), p. 654, vol. 26 (3 R R R).

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Right of owner to sue for injury to horse where his agent was named as both consignor and consignee in contract of shipment.

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Right to prove gross negligence under allegations of wilfulness and recklessness.

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Shipper cannot complain of injury to stock due to his own negligence in caring for them.

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Galliers *v.* Chicago, B. & Q. R. Co. (Iowa), p. 28, vol. 26 (3 R R R).

Sufficiency of evidence in action for injury to live stock in transit.

Susong *v.* Florida Cent. & P. R. Co. (Ga.), p. 48, vol. 26 (3 R R R).

Sufficiency of evidence of wilfulness and recklessness in action for injuries to live stock in transit.

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Sufficiency of evidence to show that plaintiff was not obliged to receive cattle reaching their destination at midnight and put in an insecure pen, although plaintiff did not have money with him for freight charges.

Houston & T. C. Ry. Co. *v.* Trammell (Tex.), p. 685, vol. 26 (3 R R R).

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Whether carrier's liability as such has ceased when it unloaded a mule, and secured it only to a light plow, painted red, is a question for the jury.

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German St. Bk. *v.* Minneapolis, etc., Ry. Co. (Minn.), p. 769, vol. 24 (1 R R R).

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Burden of proof where defendant company admitted that plaintiff was entitled to actual damages.

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Houston, E. & W. T. Ry. Co. *v.* Grubbs (Tex.), p. 754, vol. 26 (3 R R R).

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Constitutionality of statute of Nebraska creating liability for any injury to passengers except where occasioned by his own criminal negligence or violation of some express rule or regulation of carrier.

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Constitutionality of statute of Nebraska creating liability for any injury to passengers not occasioned by his own criminal negligence or violation of some rule of the company.

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Pence *v.* Wabash R. Co. (Iowa), p. 77, vol. 26 (3 R R R).

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*Selma Street & Suburban Ry. Co. v. Owen (Ala.)*, p. 97, vol. 25 (2 R R R).

Attempting to ride without ticket on later train after being expelled for exercising stop-over privilege, where ticket had been improperly taken up.

*Scofield v. Pennsylvania Co. (C. C. A.)*, p. 193, vol. 25 (2 R R R).

Boarding moving street car.

*Birmingham Ry. & Electric Co. v. Brannon (Ala.)*, p. 154, vol. 25 (2 R R R).

Boarding moving train.

*Pence v. Wabash R. Co. (Iowa)*, p. 77, vol. 26 (3 R R R).

Boarding moving train in obedience to direction of employee.

*Pence v. Wabash R. Co. (Iowa)*, p. 77, vol. 26 (3 R R R).

Boy assisting passenger jumping from moving train.

*Oxsher v. Houston, E. & W. T. Ry. Co. (Tex.)*, p. 727, vol. 26 (3 R R R).

Boy assisting passenger to board train getting off after starting of train.

*Oxsher v. Houston, E. & W. T. Ry. Co. (Tex.)*, p. 727, vol. 26 (3 R R R).

Boy sixteen years of age not incapable of sufficient discretion to avoid extending part of person beyond car line.

*Benedict v. Minneapolis & St. L. R. Co. (Minn.)*, p. 701, vol. 26 (3 R R R).

Burden of proving due care on plaintiff in action for injury to passenger caused by alighting from moving car.

*Brown v. New York, N. H. & H. R. Co. (Mass.)*, p. 143, vol. 26 (3 R R R).

Burden of proving negligence of plaintiff where it is denied

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that she was a passenger.  
*Louisville & N. R. Co. v. Harmon (Ky.)*, p. 76, vol. 24 (1 R R R).

Care required of passenger.

*Barker v. Ohio River R. Co. (W. Va.)*, p. 132, vol. 27 (4 R R R).

*Clerc v. Morgan's Louisiana & T. R. Co. (La.)*, p. 690, vol. 27 (4 R R R).

Care required of street railway passengers.

*Davis v. Paducah Ry. & Light Co. (Ky.)*, p. 684, vol. 27 (4 R R R).

Constitutionality of Nebraska statute creating liability for any injury to passengers not caused by his own criminal negligence or violation of some rule of the company.

*Chicago, R. I. & P. Ry. Co. v. Hambel (Neb.)*, p. 167, vol. 25 (2 R R R).

*Chicago, R. I. & P. Ry. Co. v. Zerneck (U. S.)*, p. 170, vol. 25 (2 R R R).

Defendant could not urge in supreme court that plaintiff's act in alighting from moving car was negligence per se where it had requested court to instruct jury to consider such conduct.

*Chicago Terminal Transfer R. Co. v. Schmelling (Ill.)*, p. 298, vol. 28 (5 R R R).

Drunken passenger trying to board moving train after ejection.

*Chesapeake & O. Ry. Co. v. Saulsberry (Ky.)*, p. 84, vol. 25 (2 R R R).

Effect of contributory negligence which was proximate cause of injury.

*Georgia Southern & F. R. Co. v. Cartledge (Ga.)*, p. 271, vol. 28 (5 R R R).

Error in refusing defendant's motion for new trial where evidence was insufficient to show negligence, where passenger was injured while alighting from street car.

*Birmingham Ry., Light & Power Co. v. Owens (Ala.)*, p. 297, vol. 28 (5 R R R).

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Extending head from car window.

Flynn *v.* Consolidated Traction Co. (N. J.), p. 688, vol. 27 (4 R R R).

Knauss *v.* Lake Erie & W. R. Co. (Ind.), p. 170, vol. 27 (4 R R R).

Failure to look and listen before crossing track to board car.

Chicago & E. I. R. Co. *v.* Huston (Ill.), p. 141, vol. 26 (3 R R R).

Failure to take seat.

Farnon *v.* Boston & A. R. Co. (Mass.), p. 95, vol. 24 (1 R R R).

In boarding street car.

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Instruction.

Davis *v.* Paducah Ry. & Light Co. (Ky.), p. 684, vol. 27 (4 R R R).

Insufficiency of allegation that plaintiff could have seen obstruction before he alighted.

Montgomery St. Ry. *v.* Mason (Ala.), p. 316, vol. 28 (5 R R R).

Jumping from moving car to avoid apparent danger.

Selma Street & Suburban Ry. Co. *v.* Owen (Ala.), p. 97, vol. 25 (2 R R R).

Jumping from moving street car to avoid dangers.

Selma Street & Suburban Ry. Co. *v.* Owen (Ala.), p. 97, vol. 25 (2 R R R).

Jumping from moving train after being carried beyond destination.

Chicago, B. & Q. R. Co. *v.* Martelle (Neb.), p. 872, vol. 27 (4 R R R).

Jumping from side door of car instead of leaving by steps.

Missouri, K. & T. Ry. Co. of Texas *v.* Hay (Tex.), p. 122, vol. 25 (2 R R R).

Jumping on greasy platform.

Newcomb *v.* New York Cent. & H. R. R. Co. (Mo.), p. 883, vol. 27 (4 R R R).

Leaving car for some purpose not incident to journey.

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Sattler (Neb.), p. 688, vol. 26 (3 R R R).

Merely stepping back into hole in platform.

Barker *v.* Ohio River R. Co. (W. Va.), p. 132, vol. 27 (4 R R R).

Necessity of passenger to leave moving car, instruction erroneous for requiring absolute necessity.

United Rys. & Elec. Co. of Baltimore *v.* Beidelman (Md.), p. 662, vol. 27 (4 R R R).

Negligence and contributory negligence.

Doolittle *v.* Southern Ry. Co. (S. Car.), p. 105, vol. 24 (1 R R R).

Knauss *v.* Lake Erie & W. R. Co. (Ind.), p. 170, vol. 27 (4 R R R).

Negligence per se in alighting from moving train.

Walters *v.* Chicago & N. W. Ry. Co. (Wis.), p. 237, vol. 25 (2 R R R).

Negro compelled to ride on platform of crowded car in excursion train.

Williams *v.* International & G. N. R. Co. (Tex.), p. 778, vol. 26 (3 R R R).

No defense where there was gross negligence.

Barker *v.* Ohio River R. Co. (W. Va.), p. 132, vol. 27 (4 R R R).

Passenger alighting from moving train at invitation of conductor was not guilty of contributory negligence.

Johnson *v.* Atlantic & N. C. R. Co. (N. Car.), p. 770, vol. 26 (3 R R R).

Passenger alighting from street car, passing around it, and stepping on other track without looking.

Bass *v.* Norfolk Ry. & Light Co. (Va.), p. 194, vol. 24 (1 R R R).

Passenger not deprived of right of visiting dining car by his knowledge of existence of an unvestibuled sleeper in train.

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Passenger riding on platform of caboose to avoid danger.

Prescott & N. W. Ry. Co. *v.* Smith (Ark.), p. 809, vol. 26 (3 R R R).

Prima facie case of contributory negligence not established by evidence of misstep of passenger while alighting.

Texas & P. Ry. Co. *v.* Gardner (C. C. A.), p. 759, vol. 26 (3 R R R).

Prospective passenger crossing in front of street railway car.

Gilliland *v.* Middlesex & S. Traction Co. (N. J.), p. 406, vol. 27 (4 R R R).

Question for jury where train was suddenly started while passenger attempted to alight.

Walters *v.* Chicago & N. W. Ry. Co. (Wis.), p. 237, vol. 25 (2 R R R).

Riding with part of person extended beyond car line.

Benedict *v.* Minneapolis & St. L. R. Co. (Minn.), p. 701, vol. 26 (3 R R R).

Riding with part of person extended beyond car line as affected by fact that cars were overcrowded and passenger was required to ride on platform.

Benedict *v.* Minneapolis & St. L. R. Co. (Minn.), p. 701, vol. 26 (3 R R R).

Right of passenger to rely on care and watchfulness of carrier.

Clerc *v.* Morgan's Louisiana & T. R. Co. (La.), p. 690, vol. 27 (4 R R R).

Standing on platform of moving car, not per se.

Doolittle *v.* Southern Ry. Co. (S. Car.), p. 105, vol. 24 (1 R R R).

Standing on platform of moving car, question for jury.

St. Louis S. W. Ry. Co. of Texas *v.* Ball (Tex.), p. 187, vol. 25 (2 R R R).

Standing on platform steps of moving car.

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Standing on side steps of open street car.

Woodroffe *v.* Roxborough, C. H. & N. Ry. Co. (Pa.), p. 186, vol. 25 (2 R R R).

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Baltimore Consol. Ry. Co. *v.* Foreman (Md.), p. 182, vol. 25 (2 R R R).

Statute of Nebraska creating liability for any injury to passenger not occasioned by his own criminal negligence or violation of some rule of the company.

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Sudden starting of car after passenger had reached platform, at direction of conductor, for the purpose of alighting.

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Sufficiency of allegation that collision was imminent when passenger jumped from moving street car to avoid danger.

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Sufficiency of evidence of contributory negligence where passenger's projecting arm was struck by car on switch track.

Clerc *v.* Morgan's Louisiana & T. R. Co. (La.), p. 690, vol. 27 (4 R R R).

Sufficiency of evidence to show contributory negligence of youth sixteen years of age riding with head extended from sides of moving train.

Benedict *v.* Minneapolis & St. L. R. Co. (Minn.), p. 701, vol. 26 (3 R R R).



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Sufficiency of evidence to show that passenger was standing on platform of moving car by invitation of conductor. *St. Louis S. W. Ry. Co. of Texas v. Ball* (Pa.), p. 187, vol. 25 (2 R R R).

Walking on track to board car.

*Spavin v. Lake Shore & M. S. Ry. Co.* (Mich.), p. 135, vol. 26 (3 R R R).

Walking to station on track.

*Chicago, St. P., M. & O. Ry. Co. v. Lagerkrans* (Neb.), p. 861, vol. 27 (4 R R R).

Where a passenger entered caboose of freight car, and, knowing that train crew were still engaged in switching, sat down in chair instead of in the seats provided for passengers, he was not in the exercise of due care, and could not recover for injuries received by being thrown from his seat by collision of a car with the caboose.

*Freeman v. Pere Marquette R. Co.* (Mich.), p. 291, vol. 28 (5 R R R).

Whether passenger was chargeable with knowledge of seating capacity of car.

*Farnon v. Boston & A. R. Co.* (Mass.), p. 95, vol. 24 (1 R R R).

**Damages.**

Assault on female passenger by drunken man in waiting room.

*Houston & T. C. R. Co. v. Phillio* (Tex.), p. 311, vol. 27 (4 R R R).

Elements of damages for injury to passenger, apprehension of insanity.

*Walker v. Boston & M. R. R.* (N. H.), p. 80, vol. 26 (3 R R R).

Evidence of mental suffering of passengers properly excluded where no personal injury was shown.

*Smith v. Wilmington & W. R. Co.* (N. Car.), p. 772, vol. 26 (3 R R R).

Excessive verdict.

*Herbert v. St. Paul City Ry. Co.* (Minn.), p. 152, vol. 26 (3 R R R).

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*Louisville & N. R. Co. v. Jordan* (Ky.), p. 268, vol. 25 (2 R R R).

Excessive verdict for injury to passenger.

*Pence v. Wabash R. Co.* (Iowa), p. 77, vol. 26 (3 R R R).

Excessive verdict for injury to passenger, question for jury.

*Loker v. Southwestern Missouri Electric Ry. Co.* (Mo.), p. 132, vol. 26 (3 R R R).

Excessive verdict where street car passenger was carried beyond destination and addressed in an insulting manner by the motorman.

*San Antonio Traction Co. v. Crawford* (Tex.), p. 517, vol. 28 (5 R R R).

Exemplary damages for ejection of passengers.

*Yazoo & M. V. R. Co. v. Rodgers* (Miss.), p. 161, vol. 25 (2 R R R).

Extra fare only could be recovered where passenger ejected by mistake of conductor to whom he refused to pay fare.

*Brown v. Rapid Ry. Co.* (Mich.), p. 819, vol. 26 (3 R R R).

Measure of damages for ejection of passengers where no evidence of malice or willful wrong.

*Illinois Cent. R. Co. v. Moore* (Miss.), p. 93, vol. 25 (2 R R R).

Measure of damages in action for injury to passenger's baggage.

*Houston, E. & W. T. Ry. Co. v. Seale* (Tex.), p. 58, vol. 25 (2 R R R).

Measure of damages where passenger is ejected because of ticket agent's mistake in selling ticket for less distant point.

*Kansas City, M. & B. R. Co. v. Foster* (Ala.), p. 609, vol. 28 (5 R R R).

Mental and physical suffering as elements of damages for injury to passenger.

*Walker v. Boston & M. R. R.* (N. H.), p. 80, vol. 26 (3 R R R).

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Pain and suffering as elements of damages in action for injury to passenger.

*Pence v. Wabash R. Co.* (Iowa), p. 77, vol. 26 (3 R R R).

Punitive damages cannot be recovered for employee's acts unless they are wilful, wanton, or malicious, and in the line of his employment.

*St. Louis, etc., Ry. Co. v. Wilson* (Ark.), p. 793, vol. 26 (3 R R R).

Punitive damages, error to submit question to jury in action for failure to stop train at flag station.

*Yazoo & M. V. R. Co. v. Faust* (Miss.), p. 818, vol. 26 (3 R R R).

Punitive damages, instruction not warranted by evidence in action for insulting prospective passenger in waiting room.

*St. Louis, etc., Ry. Co. v. Wilson* (Ark.), p. 793, vol. 26 (3 R R R).

Punitive damages, passenger's leaving train because of conductor's mistaken refusal to accept ticket.

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Negligence in stopping train too short a time for passenger to alight.

*Toler v. Yazoo & M. V. R. Co.* (Miss.), p. 146, vol. 27 (4 R R R).

Negligence, instructions as to what constitutes.

*Milligan v. Texas & N. O. R. Co.* (Tex.), p. 233, vol. 25 (2 R R R).

Negligence in transferring passenger to skiff.

*Le Blanc v. Sweet* (La.), p. 243, vol. 25 (2 R R R).

Negligence of carrier not shown by testimony of passenger, to the effect that, as he was getting off car, his foot caught in step and he fell.

*Howell v. Union Traction Co.* (Pa.), p. 153, vol. 27 (4 R R R).

Negligence of city with respect to lights at stations imputable to railroad.

*Owen v. Washington & C. R. Ry. Co.* (Wash.), p. 667, vol. 27 (4 R R R).

Negligence of company in running vestibuled train with some unprotected platforms, at unusual speed, question for the jury.

*Northern Pac. Ry. Co. v. Adams* (C. C. A.), p. 734, vol. 26 (3 R R R).

No issue as to passenger's temperament was raised by evidence in action to hold carrier

## **CARRIERS OF PASSENGERS** —Continued.

liable for conductor's use of abusive language.

*Texas & P. Ry. Co. v. Tarkington* (Tex.), p. 56, vol. 25 (2 R R R).

Nonsuit properly denied where conductor invited man ninety-one years old to alight on side of platform.

*Owen v. Washington & C. R. Ry. Co.* (Wash.), p. 667, vol. 27 (4 R R R).

Nonsuit properly ordered in action for carrying passenger beyond destination where she was a woman accompanied by her children, and it was raining.

*Smith v. Wilmington & W. R. Co.* (N. Car.), p. 772, vol. 26 (3 R R R).

Not entitled to stop-over privilege in absence of agreement.

*Louisville & N. R. Co. v. Klyman* (Tenn.), p. 199, vol. 25 (2 R R R).

Passenger actually on train whether it is moving or not is being "transported over road," within meaning of Nebraska statute.

*Chicago, etc., Ry. Co. v. Sattler* (Neb.), p. 688, vol. 26 (3 R R R).

Passenger invited to stand on steps of moving car thrown off through sudden stoppage of train.

*Southern Ry. Co. v. Roebuck* (Ala.), p. 204, vol. 25 (2 R R R).

Passenger leaving car for a purpose not incident to journey is not being "transported over road," within meaning of Nebraska statute.

*Chicago, etc., Ry. Co. v. Sattler* (Neb.), p. 688, vol. 26 (3 R R R).

Peremptory instruction for defendant properly refused where child was thrown down by sudden starting of car before she had time to be seated.

*Herbich v. North Jersey St. Ry. Co.* (N. J.), p. 255, vol. 28 (5 R R R).

Person accompanying passenger a licensee.

*Houston & T. C. R. Co. v. Phillio* (Tex.), p. 277, vol. 28 (5 R R R).



**CARRIERS OF PASSENGERS***—Continued.*

Presumption of negligence from injury to passenger.

Texas & P. Ry. Co. *v.* Gardner (C. C. A.), p. 759, vol. 26 (3 R R R).

Presumption of negligence where carrier was injured in a collision.

Howe *v.* Northern Pac. Ry. Co. (Wash.), p. 624, vol. 28 (5 R R R).

Prima facie case of negligence.

Le Blanc *v.* Sweet (La.), p. 243, vol. 25 (2 R R R).

Prima facie case of negligence where evidence of defect in things carrier is bound to supply.

Davis *v.* Paducah Ry. & Light Co. (Ky.), p. 684, vol. 27 (4 R R R).

Prima facie case of negligence where passenger was injured.

United Rys. & Elec. Co. of Baltimore *v.* Beidelman (Md.), p. 662, vol. 27 (4 R R R).

Proximate cause where passenger was injured on track of another company after alighting.

Chicago Terminal Transfer R. Co. *v.* Schmelling (Ill.), p. 298, vol. 28 (5 R R R).

Proximate cause where street railway passenger was injured in panic among passengers caused by flashes of electricity.

Davis *v.* Paducah Ry. & Light Co. (Ky.), p. 684, vol. 27 (4 R R R).

Punitive damages for injury to passenger through gross negligence.

Louisville & N. R. Co. *v.* McClain (Ky.), p. 95, vol. 25 (2 R R R).

Question for jury as to negligence in overcrowding excursion train.

Williams *v.* International & G. N. R. Co. (Tex.), p. 778, vol. 26 (3 R R R).

Question for jury where a street railway passenger was injured by reason of negligence in running car at excessive speed around curve.

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Question for jury whether conduct of conductor in enforcing person on train to assist passenger to remain on platform was cause of his injury where he was thrown therefrom.

Great Northern Ry. Co. *v.* Bruyere (C. C. A.), p. 141, vol. 27 (4 R R R).

Question for jury whether plaintiff's resistance to expulsion was made to enhance damages.

Patterson *v.* Southern Pac. Co. (Tex.), p. 156, vol. 25 (2 R R R).

Question for jury whether prospective passenger walking on bridge was a trespasser or licensee.

Chicago Terminal Transfer Co. *v.* Gruss (Ill.), p. 704, vol. 28 (5 R R R).

Question for jury whether street railway passenger was discharged at dangerous place.

Sweet *v.* Louisville Ry. Co. (Ky.), p. 768, vol. 26 (3 R R R).

Question for jury whether there was negligence in overcrowding excursion train where negro was injured by reason of having to ride on platform of swaying car.

Williams *v.* International & G. N. R. Co. (Tex.), p. 778, vol. 26 (3 R R R).

Question for jury whether there was negligence in stopping car while passenger was attempting to alight.

Smalley *v.* Detroit & M. Ry. Co. (Mich.), p. 618, vol. 28 (5 R R R).

Question of fitness of place of ejection of passenger, eliminated where he was injured at a point twenty-five or thirty feet distant.

Gaukler *v.* Detroit, G. H. & M. Ry. Co. (Mich.), p. 806, vol. 26 (3 R R R).

Railroad cannot complain that it is deprived of its property without due process of law by statute of Nebraska statute creating liability for injuries to passenger in absence of contributory negligence.

Chicago, R. I. & P. Ry. Co. *v.* Zerneck (U. S.), p. 170, vol. 25 (2 R R R).

**CARRIERS OF PASSENGERS***—Continued.*

Ratification of compromise of claim for injury to passenger, made in hospital.

Louisville & N. R. Co. *v.* Carter (Ky.), vol. 119, vol. 25 (2 R R R).

Right to instruction that failure to ring gong was not negligence, in action for injury to passenger sustained in collision with vehicle going in same direction.

West Chicago St. R. Co. *v.* Tuerk (Ill.), p. 1, vol. 24 (1 R R R).

Right to rely on apparent authority of conductor of freight train to receive and carry passengers.

Simmons *v.* Oregon R. & Nav. Co. (Ore.), p. 280, vol. 28 (5 R R R).

Right to resume journey after exercising stop-over privilege where ticket has been improperly taken up.

Scofield *v.* Pennsylvania Co. (C. C. A.), p. 193, vol. 25 (2 R R R).

Right to resume journey without ticket after exercising stop-over privilege.

Scofield *v.* Pennsylvania Co. (C. C. A.), p. 193, vol. 25 (2 R R R).

Right to stop over-privilege.

Scofield *v.* Pennsylvania Co. (C. C. A.), p. 193, vol. 25 (2 R R R).

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**Signals.**

Liability as affected by failure to give signals where accident was near crossing.

Bishop *v.* Southern Ry. (S. Car.), p. 748, vol. 27 (4 R R R).

Speed as negligence, question for jury.

Muhlhouse *v.* Monongahela St. Ry. Co. (Pa.), p. 131, vol. 25 (2 R R R).

Statute of Nebraska creating liability for any injury to a passenger.

Chicago, R. I. & P. R. Co. *v.* Hambel (Neb.), p. 167, vol. 25 (2 R R R).

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Payne *v.* Terre Haute & I. R. Co. (Ind.), p. 111, vol. 25 (2 R R R).

Sufficiency of allegation of failure to provide safe landing place.

Montgomery St. Ry. *v.* Mason (Ala.), p. 316, vol. 28 (5 R R R).

Sufficiency of allegation that brakeman was acting within scope of his employment when assisting passenger to alight.

Pittsburgh, C., C. & St. L. Ry. Co. *v.* Gray (Ind.), p. 120, vol. 27 (4 R R R).

Sufficiency of allegation that collision was imminent.

Selma Street & Suburban Ry. Co. *v.* Owen (Ala.), p. 97, vol. 25 (2 R R R).

Sufficiency of description in petition of articles destroyed or injured, in action for injury to passenger's baggage.

Houston, E. & W. T. Ry. Co. *v.* Seale (Tex.), p. 58, vol. 25 (2 R R R).

Sufficiency of evidence of failure to furnish sufficient motive power, in action for injury to passenger caused by sudden jar.

Farnon *v.* Boston & A. R. Co. (Mass.), p. 95, vol. 24 (1 R R R).

Sufficiency of evidence of negligence.

Whittlesey *v.* Burlington, etc., Ry. Co. (Iowa), p. 680, vol. 27 (4 R R R).

Sufficiency of evidence of negligence, in action for injury sustained by passenger on mixed train.

Symonds *v.* Minneapolis & St. L. Ry. Co. (Minn.), p. 605, vol. 28 (5 R R R).

Sufficiency of evidence of negligence in action for injury to passenger on freight train caused by jerking.

Southern Ry. Co. *v.* Vandergriff (Tenn.), p. 104, vol. 24 (1 R R R).

Sufficiency of evidence of negligence in letting off street railway passenger.

Phillips *v.* St. Charles St. R. Co. (La.), p. 902, vol. 24 (1 R R R).

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Sufficiency of evidence of negligence of motorman of passing car where passenger alighting from another car was struck by it.

Ackerstadt *v.* Chicago City Ry. Co. (Ill.), p. 164, vol. 27 (4 R R R).

Sufficiency of evidence of negligence on the part of company in furnishing place to alight.

Duell *v.* Chicago & N. W. Ry. Co. (Wis.), p. 594, vol. 28 (5 R R R).

Sufficiency of evidence of negligence where intending street railway passenger was struck by car after stumbling upon track.

Winchell *v.* St. Paul City Ry. Co. (Minn.), p. 177, vol. 27 (4 R R R).

Sufficiency of evidence of negligence where passenger slipped on ice and snow on car steps and platform.

Herbert *v.* St. Paul City Ry. Co. (Minn.), p. 152, vol. 26 (3 R R R).

Sufficiency of evidence of negligence where passenger was injured by sudden jar.

Frohriep *v.* Lake Shore & M. S. Ry. Co. (Mich.), p. 532, vol. 27 (4 R R R).

Sufficiency of evidence of negligence where traveler while alighting from one street car was injured by another.

Ackerstadt *v.* Chicago City Ry. Co. (Ill.), p. 164, vol. 27 (4 R R R).

Sufficiency of evidence of payment of fare.

Crawleigh *v.* Galveston, H. & S. A. Ry. Co. (Tex.), p. 630, vol. 25 (2 R R R).

Sufficiency of evidence that injury was caused by ice on car steps.

Richmond Ry. & Electric Co. *v.* West (Va.), p. 177, vol. 25 (2 R R R).

Sufficiency of evidence to show defendant's liability where passenger was injured by reason of car window falling on his fingers.

International & G. N. R. Co. *v.* Phillips (Tex.), p. 411, vol. 27 (4 R R R).

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Sufficiency of evidence to show invitation from agent to cross depot grounds to purchase ticket.

Davis *v.* Houston, E. & W. T. Ry. Co. (Tex.), p. 800, vol. 26 (3 R R R).

Sufficiency of evidence to show negligence in failing to light platform.

Duell *v.* Chicago & N. W. Ry. Co. (Wis.), p. 594, vol. 28 (5 R R R).

Sufficiency of evidence to show that passenger left a car for some purpose not incident to his journey, so as to be unable to claim protection of Nebraska statute providing for liability in certain cases where passenger is being "transported over road."

Chicago, etc., Ry. Co. *v.* Sattler (Neb.), p. 688, vol. 26 (3 R R R).

Sufficiency of evidence to show ticket agent's knowledge of passenger's relationship, in action for mental anguish of mother from separation from her children, caused by negligence in starting train too soon.

International & G. N. R. Co. *v.* Anchonda (Tex.), p. 788, vol. 26 (3 R R R).

Sufficiency of evidence to warrant instruction as to defendant's freedom for negligence where passenger was injured in accident caused by fallen tree across track.

Alabama Midland Ry. Co. *v.* Guilford (Ga.), p. 62, vol. 25 (2 R R R).

Sufficiency of finding to preclude supreme court from finding, as matter of law, that plaintiff was passenger when injured, and defendant failed to exercise due care for her safety.

Weeks *v.* Chicago & N. W. Ry. Co. (Ill.), p. 426, vol. 28 (5 R R R).

Sufficiency of time allowed passenger to alight, question for jury.

Walters *v.* Chicago & N. W. Ry. Co. (Wis.), p. 237, vol. 25 (2 R R R).

**CARRIERS OF PASSENGERS***—Continued.*

Sufficiency of verdict against lessor and lessee for injury to passenger.

West Chicago St. Ry. Co. *v.* Horne (Ill.), p. 582, vol. 28 (5 R R R).

Sufficient number of seats, question for jury.

Farnon *v.* Boston & A. R. Co. (Mass.), p. 95, vol. 24 (1 R R R).

Testimony that plaintiff, while standing on foot-board, lost his balance, because of rough condition of track, was inadmissible where not averred in declaration.

Richmond Ry. & Electric Co. *v.* West (Va.), p. 177, vol. 25 (2 R R R).

The fact that a passenger on a railroad train has been drinking and is boisterous, though it may warrant his expulsion from the train, does not authorize an assault on him by conductor.

St. Louis S. W. Ry. Co. of Texas *v.* Johnson (Tex.), p. 174, vol. 27 (4 R R R).

**Tickets and Fares.**

Excursion ticket construed to embody contract entitling holder to transportation between certain points.

International & G. N. R. Co. *v.* Ing (Tex.), p. 746, vol. 26 (3 R R R).

Passenger was not obliged to prove that defendant executed and issued ticket where non est factum was not pleaded.

International & G. N. R. Co. *v.* Ing (Tex.), p. 746, vol. 26 (3 R R R).

Passes, whether transferable under Act June 10, 1897, of Illinois.

Allardt *v.* People (Ill.), p. 674, vol. 27 (4 R R R).

Right to discriminate between passengers in charging.

Phillips *v.* Southern Ry. Co. (Ga.), p. 80, vol. 24 (1 R R R).

Right to exact higher rate because of failure to procure ticket, where there was no opportunity.

Phillips *v.* Southern Ry. Co. (Ga.), p. 80, vol. 24 (1 R R R).

**CARRIERS OF PASSENGERS***—Continued.*

Ticket not having printed notice provided for by Texas statute not transferable.

International & G. N. R. Co. *v.* Ing (Tex.), p. 746, vol. 26 (3 R R R).

Ticket prima facie evidence of right to carriage between certain points.

International & G. N. R. Co. *v.* Ing (Tex.), p. 746, vol. 26 (3 R R R).

Tickets transferable.

International & G. N. R. Co. *v.* Ing (Tex.), p. 746, vol. 26 (3 R R R).

Time of expiration of excursion ticket.

Rutherford *v.* St. Louis S. W. Ry. Co. of Texas (Tex.), p. 162, vol. 25 (2 R R R).

Unauthorized indorsement of purchaser's name as fraudulent alteration of mileage book.

Holden *v.* Rutland R. Co. (Vt.), p. 227, vol. 25 (2 R R R).

Under Michigan statute providing that a penalty may be recovered by party aggrieved in case of refusal of carrier to take and transport passengers or property, the shipper and not a connecting carrier to whom freight is consigned is the party to sue to recover penalties.

Crosby *v.* Pere Marquette R. Co. (Mich.), p. 411, vol. 27 (4 R R R).

Variance from declaration in action for injury to passenger claimed to have been caused by ice on car step.

Richmond Ry. & Electric Co. *v.* West (Va.), p. 177, vol. 25 (2 R R R).

Violation of ordinance as negligence, in action for injury to street railway passenger.

Selma Street & Suburban Ry. Co. *v.* Owen (Ala.), p. 97, vol. 25 (2 R R R).

Whether action for injury to passenger on contract or for tort.

Chesapeake & N. Ry. *v.* Hammer (Ky.), p. 180, vol. 25 (2 R R R).

**CARRIERS OF PASSENGERS**  
—Continued.**Who Are Passengers.**

Alleged passenger on freight train presumptively a trespasser.

Purple *v.* Union Pac. R. Co. (C. C. A.), p. 711, vol. 26 (3 R R R).

Employees riding free when off duty.

Simmons *v.* Oregon R. Co. (Ore.), p. 896, vol. 27 (4 R R R).

Essentials of relationship.

Simmons *v.* Oregon R. Co. (Ore.), p. 896, vol. 27 (4 R R R).

Liability for injury to person accepted as passenger by conductor having apparent authority.

Spence *v.* Chicago, R. I. & P. Ry. Co. (Iowa), p. 822, vol. 26 (3 R R R).

One entering train with understanding with conductor not to pay fare a trespasser.

Purple *v.* Union Pac. R. Co. (C. C. A.), p. 711, vol. 26 (3 R R R).

One riding on train prohibited from carrying passengers a trespasser.

Purple *v.* Union Pac. R. Co. (C. C. A.), p. 711, vol. 26 (3 R R R).

One, who has paid his fare, riding on freight train with consent of conductor is a passenger.

Crawleigh *v.* Galveston, H. & S. A. Ry. Co. (Tex.), p. 630, vol. 25 (2 R R R).

Paymaster traveling on business of his office not a passenger within meaning of accident insurance policy.

Travelers' Ins. Co. *v.* Austin (Ga.), p. 433, vol. 28 (5 R R R).

Person on platform after alighting from train.

Pittsburgh, C., C. & St. L. Ry. Co. *v.* Gray (Ind.), p. 120, vol. 27 (4 R R R).

Person riding on freight trains.

Simmons *v.* Oregon R. Co. (Ore.), p. 896, vol. 27 (4 R R R).

Person riding on hand car by invitation of section foreman is not a passenger.

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(Ore.), p. 511, vol. 24 (1 R R R).

Person standing on narrow space after alighting.

Chicago Terminal Transfer R. Co. *v.* Schmelling (Ill.), p. 298, vol. 28 (5 R R R).

Right of passenger to leave train on account of business or curiosity.

Chicago, R. I. & P. Ry. Co. *v.* Sattler (Neb.), p. 688, vol. 26 (3 R R R).

When a finding that deceased was not a passenger is properly sustained.

Crawleigh *v.* Galveston, H. & S. A. Ry. Co. (Tex.), p. 630, vol. 25 (2 R R R).

Whether person intending to become a passenger was a trespasser while crossing a trestle, by invitation of the conductor, in order to reach a train, was a question for the jury.

Chicago Terminal Transfer Co. *v.* Kotoski (Ill.), p. 530, vol. 28 (5 R R R).

Wrong of ticket agent in selling ticket to place where yellow fever was prevalent as proximate cause of passenger's suffering from the disease.

Kansas City, M. & B. R. Co. *v.* Foster (Ala.), p. 609, vol. 28 (5 R R R).

**CARS.**

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*Carriers of Passengers.*  
*Foreign Cars.*  
*Interstate Commerce.*  
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**CAR STEPS.**

*See Carriers of Passengers.*

**CATTLE.**

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**CATTLE CHUTE.**

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**CATTLE GUARDS.**

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Application of Mississippi statute requiring construction of cattle guards.

Gibbons *v.* Yazoo & M. V. R. Co. (Miss.), p. 345, vol. 28 (5 R R R).



**CATTLE GUARDS—Continued.**

Merely nominal damages could be recovered for breach of covenant to maintain where no loss was occasioned thereby. *Douglass v. Ohio River Co.* (W. Va.), p. 430, vol. 27 (4 R R R).

Mere speculative and conjectural estimates of profits which might have been made, had there not been breach of covenants to maintain cattle guard, are not a legitimate basis upon which to fix damages. *Douglass v. Ohio River R. Co.* (W. Va.), p. 430, vol. 27 (4 R R R).

**CERTIFICATE OF CHARACTER.**

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**CERTIFICATES.**

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**CHANGE OF GRADE.**

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**CHILDREN.**

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*Death by Wrongful Act.*

Admissions of children as evidence.

*Chicago City Ry. Co. v. Tuohy* (Ill.), p. 1, vol. 27 (4 R R R).

Burden of proving that boy was injured while attempting to rescue his brother from being crushed in turntable.

*Thomason v. Southern Ry. Co.* (C. C. A.), p. 804, vol. 24 (1 R R R).

Care required in securing turntables.

*Chicago, B. & O. R. Co. v. Kravenbuhl* (Neb.), p. 35, vol. 28 (5 R R R).

Care required of engineer upon seeing a small child running across depot platform in direction of track, in apparent fright.

*Livingston v. Wabash R. Co.* (Mo.), p. 686, vol. 28 (5 R R R).

**CHILDREN—Continued.**

Care required of motorman in looking out for children.

*Sample v. Consolidated Light & Ry. Co.* (W. Va.), p. 380, vol. 24 (1 R R R).

Care required of railroad company at point where children have been habitually permitted to board and ride upon trains.

*Ashworth v. Southern Ry. Co.* (Ga.), p. 679, vol. 28 (5 R R R).

Care required of railroad company at point where children have been permitted without objection, to board and ride train, erroneous instruction.

*Ashworth v. Southern Ry. Co.* (Ga.), p. 679, vol. 28 (5 R R R).

**Contributory Negligence.**

Age and intelligence of boy eleven years old to be considered in determining issue of contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Scarborough* (Tex.), p. 608, vol. 26 (3 R R R).

Boy sixteen years of age not incapable of sufficient discretion to avoid extending part of person beyond car line.

*Benedict v. Minneapolis & St. L. R. Co.* (Minn.), p. 701, vol. 26 (3 R R R).

Burden of proving where boy eleven years of age was injured by projection from car while standing near track.

*Missouri, K. & T. Ry. Co. of Texas v. Scarborough* (Tex.), p. 608, vol. 26 (3 R R R).

Care required of children.

*Citizens' St. R. Co. v. Hamer* (Ind.), p. 9, vol. 25 (2 R R R).

Child seven years old injured by street car while trying to avoid another car.

*Citizens' St. R. Co. v. Hamer* (Ind.), p. 9, vol. 25 (2 R R R).

Child seven years old too young to apprehend danger from riding on turntable.

*Edgington v. Burlington, C. R. & N. Ry. Co.* (Iowa), p. 249, vol. 27 (4 R R R).

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- Child under seven years of age incapable of contributory negligence.  
*Chicago City Ry. Co. v. Tuohy* (Ill.), p. 1, vol. 27 (4 R R R).
- Child under seven years old incapable of contributory negligence.  
*Illinois Cent. R. Co. v. Jernigan* (Ill.), p. 535, vol. 28 (5 R R R).
- Contributory negligence of boy in running along side of train.  
*Fezler v. Willmar & S. F. Ry. Co.* (Minn.), p. 174, vol. 24 (1 R R R).
- Crossings, effect of contributory negligence of children.  
*Rowe v. Central of Georgia Ry. Co.* (Ga.), p. 937, vol. 27 (4 R R R).
- Instruction failing to state facts in reference to defendant's negligence.  
*Citizens' St. R. Co. v. Hamer* (Ind.), p. 9, vol. 25 (2 R R R).
- Negligence of motorman in failing to stop car as affected by contributory negligence of child seven years old injured by it.  
*Citizens' St. R. Co. v. Hamer* (Ind.), p. 9, vol. 25 (2 R R R).
- Negligence of parent of six year old child in allowing him to cross street tracks with boy eleven years, not imputable to child.  
*Chicago City Ry. Co. v. Tuohy* (Ill.), p. 1, vol. 27 (4 R R R).
- Of boy assisting passenger, in jumping from moving train.  
*Oxsher v. Houston, E. & W. T. Ry. Co.* (Tex.), p. 727, vol. 26 (3 R R R).
- Of boy ten years old in attempting to climb over train obstructing crossing.  
*Todd v. Philadelphia & R. Ry. Co.* (Pa.), p. 37, vol. 25 (2 R R R).
- Of father in action for death of son.  
*Cleveland, A. & C. Ry. Co. v. Workman* (Ohio), p. 551, vol. 27 (4 R R R).
- Question for jury where child seven years old was injured

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- by street car.  
*Citizens' St. R. Co. v. Hamer* (Ind.), p. 9, vol. 25 (2 R R R).
- Sufficiency of evidence to show capacity of child to exercise care for its own safety.  
*Chicago City Ry. Co. v. Tuohy* (Ill.), p. 1, vol. 27 (4 R R R).
- Sufficiency of evidence to show contributory negligence of youth sixteen years of age riding with head extended from sides of moving train.  
*Benedict v. Minneapolis & St. L. R. Co.* (Minn.), p. 701, vol. 26 (3 R R R).
- The fact that a street car could have been seen by child seven years old injured by it was one to be considered.  
*Citizens' St. R. Co. v. Hamer* (Ind.), p. 9, vol. 25 (2 R R R).
- Damages.**
- Cost of maintenance to be considered in action for death of boy.  
*Snyder v. Lake Shore & M. S. Ry. Co.* (Mich.), p. 283, vol. 28 (5 R R R).
- Instruction, in action for death of boy, as to probable earnings not erroneous as invading province of jury.  
*Snyder v. Lake Shore & M. S. Ry. Co.* (Mich.), p. 283, vol. 28 (5 R R R).
- Measure of damages for death of child.  
*Texas & P. Ry. Co. v. Harby* (Tex.), p. 602, vol. 25 (2 R R R).
- Measure of damages in action for death of boy.  
*Snyder v. Lake Shore & M. S. Ry. Co.* (Mich.), p. 283, vol. 28 (5 R R R).
- Presumption of loss, in action by father for death of son.  
*Chicago & E. I. R. Co. v. Huston* (Ill.), p. 141, vol. 26 (3 R R R).
- Probable expense of education to be considered in action for death of boy.  
*Snyder v. Lake Shore & M. S. Ry. Co.* (Mich.), p. 283, vol. 28 (5 R R R).

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Liability for failing to provide safe place for discharging passengers.

Montgomery St. Ry. *v.* Mason (Ala.), p. 316, vol. 28 (5 R R R).

Liability for injury to alighting passenger.

Louisville & N. R. Co. *v.* Harmon (Ky.), p. 76, vol. 24 (1 R R R).

Liability for injury to boy assisting passengers caused by getting off train after it is started, as affected by fact that trainmen had not been notified that he was not a passenger.

Oxsher *v.* Houston, E. & W. T. Ry. Co. (Tex.), p. 727, vol. 26 (3 R R R).

Liability for injury to female passenger carried beyond destination and compelled to remain in cold and unlighted depot.

St. Louis S. W. Ry. Co. of Texas *v.* Ricketts (Tex.), p. 467, vol. 28 (5 R R R).

Liability for injury to husband on board to assist his wife, caused by being thrown from platform where he was forced to remain by conductor.

Great Northern Ry. Co. *v.* Bruyere (C. C. A.), p. 141, vol. 27 (4 R R R).

Liability for injury to intending street railway passenger struck by car after stumbling upon track.

Winchell *v.* St. Paul City Ry. Co. (Minn.), p. 177, vol. 27 (4 R R R).

Liability for injury to passenger by derailment of train.

Whipple *v.* Michigan Cent. R. Co. (Mich.), p. 774, vol. 25 (2 R R R).

Liability for injury to passenger compelled to ride on platform of swaying car.

Williams *v.* International & G. N. R. Co. (Tex.), p. 778, vol. 26 (3 R R R).

Liability for injury to passenger guilty of contributory negligence where negligence proximate cause.

Doolittle *v.* Southern Ry. Co. (S. Car.), p. 105, vol. 24 (1 R R R).

**CARRIERS OF PASSENGERS***—Continued.*

Liability for injury to passenger in station of terminal company where carrier had not contracted for use of separate portion thereof.

Frazier *v.* New York, N. H. & H. R. Co. (Mass.), p. 814, vol. 26 (3 R R R).

Liability for injury to passenger sustained in another state.

Louisville & N. R. Co. *v.* Harmon (Ky.), p. 76, vol. 24 (1 R R R).

Liability for injury to passenger where negligence and contributory negligence combined as proximate cause.

Doolittle *v.* Southern Ry. Co. (S. Car.), p. 105, vol. 24 (1 R R R).

Liability for injury to postal clerk sustained in postal car switched on side track and in charge of another corporation.

Stoddard *v.* New York, N. H. & H. R. Co. (Mass.), p. 312, vol. 27 (4 R R R).

Liability for insults by servant. San Antonio Traction Co. *v.* Crawford (Tex.), p. 517, vol. 28 (5 R R R).

Liability for negligence of master of steamboat.

Le Blanc *v.* Sweet (La.), p. 243, vol. 25 (2 R R R).

Liability for negligence of motorman, in action for injury to passenger caused by falling wall.

Buehler *v.* Union Traction Co. (Pa.), p. 92, vol. 24 (1 R R R).

Liability for negligence which was proximate cause of injury to passenger.

Doolittle *v.* Southern Ry. Co. (S. Car.), p. 105, vol. 24 (1 R R R).

Liability for permitting infant to leave train before reaching destination where conductor promised to put her off at destination.

Louisville & N. R. Co. *v.* Jordan (Ky.), p. 268, vol. 25 (2 R R R).

Liability for refusal to unlock station room.

St. Louis, etc., Ry. Co. *v.* Wilson (Ark.), p. 793, vol. 26 (3 R R R).

**CARRIERS OF PASSENGERS***—Continued.*

Liability of carrier using union depot, for injury to its passenger caused by unsafe approach.

Herrman *v.* Great Northern Ry. Co. (Wash.), p. 154, vol. 27 (4 R R R).

Liability for willful and wanton and malicious acts of employees to passenger.

St. Louis, etc., Ry. Co. *v.* Wilson (Ark.), p. 793, vol. 26 (3 R R R).

Liability where agent permits drunken person to enter waiting room and use vulgar language before female passenger.

Houston & T. C. R. Co. *v.* Phillio (Tex.), p. 311, vol. 27 (4 R R R).

Liability where passenger on freight train was compelled by conductor to jump from it while it was in motion as affected by representation of ticket agent, and rules of company prohibiting carriage of passengers on such train.

Indiana, D. & W. Ry. Co. *v.* Ditto (Ind.), p. 703, vol. 27 (4 R R R).

**Limiting Liability.**

Contract exempting company from liability for any injury to person did not extend to passenger's death.

Northern Pac. Ry. Co. *v.* Adams (C. C. A.), p. 734, vol. 26 (3 R R R).

Passengers on freight train.

Richmond *v.* Southern Pac. Co. (Ore.), p. 49, vol. 25 (2 R R R).

Pleading in action for injury to passenger's baggage.

Houston, E. & W. T. Ry. Co. *v.* Seale (Tex.), p. 58, vol. 25 (2 R R R).

Questions of law and questions of fact in action for injury to passenger's baggage.

Houston, E. & W. T. Ry. Co. *v.* Seale (Tex.), p. 58, vol. 25 (2 R R R).

Limits of depot premises under Mississippi Code prohibiting the backing of trains near passenger depots beyond a certain speed.

King *v.* Illinois Cent. R. Co.

**CARRIERS OF PASSENGERS***—Continued.*

(C. C. A.), p. 875, vol. 26 (3 R R R).

Mere fact that passenger fell from street car raised no presumption of negligence on part of operators of car.

Paynter *v.* Bridgeton & M. Traction Co. (N. J.), p. 390, vol. 28 (5 R R R).

Nature of liability and degree of care required of carriers of passengers.

Milligan *v.* Texas & N. O. R. Co. (Tex.), p. 233, vol. 25 (2 R R R).

Necessity of pleading that plaintiff's injury resulted from rough condition of track.

Richmond Ry. & Electric Co. *v.* West (Va.), p. 177, vol. 25 (2 R R R).

Negligence causing injury to passenger through sudden starting of car.

Betts *v.* Wilmington City Ry. Co. (Del.), p. 602, vol. 28 (5 R R R).

Negligence in construction of platform upon which passenger jumped from moving train was shown.

Newcomb *v.* New York Cent. & H. R. R. Co. (Mo.), p. 883, vol. 27 (4 R R R).

Negligence in crowding cars in park, question for jury, where collision between passengers on platforms.

Muhlhouse *v.* Monongahela St. Ry. Co. (Pa.), p. 131, vol. 25 (2 R R R).

Negligence in giving signal to start.

Walters *v.* Chicago & N. W. Ry. Co. (Wis.), p. 237, vol. 25 (2 R R R).

Negligence in inviting passenger known to be ignorant of traveling to alight from moving car.

Doolittle *v.* Southern Ry. Co. (S. Car.), p. 105, vol. 24 (1 R R R).

Negligence in placing car on switch near main track.

Clerc *v.* Morgan's Louisiana & T. R. Co. (La.), p. 690, vol. 27 (4 R R R).

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**CHILDREN—Continued.**

- Recovery for physical suffering and loss of earning capacity.  
 Delaware, L. & W. R. Co. *v.* Devore (C. C. A.), p. 300, vol. 27 (4 R R R).
- Special aptitude of deceased for certain business may be considered in determining earning capacity of boy.  
 Snyder *v.* Lake Shore & M. S. Ry. Co. (Mich.), p. 283, vol. 28 (5 R R R).
- Declarations of engineer acting in sport as *res gestæ* in action for frightening child by blowing off steam.  
 Alsever *v.* Minneapolis & St. L. R. Co. (Iowa), p. 587, vol. 24 (1 R R R).
- Direction of verdict for defendant in action for injuries to boy playing on turntable.  
 Alabama G. S. R. Co. *v.* Crocker (Ala.), p. 800, vol. 24 (1 R R R).
- Direction of verdict for defendant, in action for injuries to boy sustained while trying to save his brother from being caught in turntable.  
 Thomason *v.* Southern Ry. Co. (C. C. A.), p. 804, vol. 24 (1 R R R).
- Duty of engineer to look out for children on track.  
 Texas & P. Ry. Co. *v.* Harby (Tex.), p. 602, vol. 25 (2 R R R).
- Duty to look for trespassing children under train on switch track.  
 Flores *v.* Atchison, etc., Ry. Co. (Tex.), p. 709, vol. 24 (1 R R R).
- Duty to warn children of danger of going on trains.  
 St. Louis S. W. Ry. Co. *v.* Abernathy (Tex.), p. 246, vol. 27 (4 R R R).
- Engineer has no right to assume that child three and one-half years of age, running across depot platform in direction of track, will stop before crossing it.  
 Livingston *v.* Wabash R. Co. (Mo.), p. 686, vol. 28 (5 R R R).
- Evidence as to extent of boy's injury, in action by father.  
 Illinois Cent. R. Co. *v.* Henon (Ky.), p. 145, vol. 26 (3 R R R).

**CHILDREN—Continued.**

- Evidence that father gave son car fare, in action for injury sustained by latter while crossing track to board car.  
 Chicago & E. I. R. Co. *v.* Huston (Ill.), p. 141, vol. 26 (3 R R R).
- Failure to allege manumission by father, in action for injury to son.  
 Illinois Cent. R. Co. *v.* Henon (Ky.), p. 145, vol. 26 (3 R R R).
- Harmless error in instructing as to care required of trainmen where injury to child on track could not have been avoided.  
 Combs *v.* Georgia R. & Banking Co. (Ga.), p. 35, vol. 28 (5 R R R).
- Imputed negligence of parent barring recovery where unattended child was injured while on railroad track.  
 Cotter *v.* Lynn & B. R. R. (Mass.), p. 710, vol. 27 (4 R R R).
- Incapacity of child *non sui juris* must be pleaded.  
 Citizens' St. R. Co. *v.* Hamer (Ind.), p. 9, vol. 25 (2 R R R).
- Insufficiency of evidence of negligence where trespassing child was injured by explosion of torpedo on track.  
 Louisville & N. R. Co. *v.* Hart (Ky.), p. 521, vol. 28 (5 R R R).
- Insufficiency of evidence to show wanton or intentional negligence where children were injured by torpedoes on track.  
 Hughes *v.* Boston & M. R. R. (N. H.), p. 194, vol. 27 (4 R R R).
- Liability for injuries to boy on track as affected by failure to fence.  
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- Liability for injuries to boy received in crossing tracks, after passing through freight yard, as affected by failure to fence between tracks and freight yard, or between yard and street, under Massachusetts statute requiring railroad companies to fence roads to prevent entrance of cattle.  
 Byrnes *v.* Boston & M. R. R. (Mass.), p. 600, vol. 26 (3 R R R).



**CHILDREN—Continued.**

Liability for injuries to children caused by failure to prevent them from trespassing on train.

St. Louis S. W. Ry. Co. *v.* Abernathy (Tex.), p. 246, vol. 27 (4 R R R).

Liability for injuries to children playing on turntables.

Alabama G. S. R. Co. *v.* Crocker (Ala.), p. 800, vol. 24 (1 R R R).

Liability for killing of boy making a short cut to circus showing in railroad yard.

Clark *v.* Northern Pac. Ry. Co. (Wash.), p. 755, vol. 27 (4 R R R).

Liability for negligence of engineer in failing to see child on railroad bridge.

Texas & P. Ry. Co. *v.* Harby (Tex.), p. 602, vol. 25 (2 R R R).

Liability for, permitting infant to leave train before reaching destination where conductor promised to put her off at destination.

Louisville & N. R. Co. *v.* Jordan (Ky.), p. 268, vol. 25 (2 R R R).

Liability for wanton act of engineer in frightening child by blowing off steam.

Alsever *v.* Minneapolis & St. L. R. Co. (Iowa), p. 587, vol. 24 (1 R R R).

Liability to father for personal injuries of son employed without former's consent.

Illinois Cent. R. Co. *v.* Henon (Ky.), p. 145, vol. 26 (3 R R R).

Liability where boy stealing ride was caught and lectured, and through fright collided with car.

Palmisano *v.* New Orleans City R. Co. (La.), p. 753, vol. 27 (4 R R R).

Limitation applicable to action for injury to infant brought by him after attaining majority.

Missouri, K. & T. Ry. Co. of Texas *v.* Scarborough (Tex.), p. 608, vol. 26 (3 R R R).

Maintenance of turntable not negligence per se.

Thomason *v.* Southern Ry. Co. (C. C. A.), p. 804, vol. 24 (1 R R R).

**CHILDREN—Continued.**

Mere fact that trainmen do not know that children are trespassing on train, will not relieve company from liability for injuries to them.

St. Louis S. W. Ry. Co. *v.* Abernathy (Tex.), p. 246, vol. 27 (4 R R R).

Negligence in leaving turntable insecurely fastened.

Edgington *v.* Burlington, C. R. & N. Ry. Co. (Iowa), p. 249, vol. 27 (4 R R R).

Negligence in running over child on street railway track.

Jones *v.* United Traction Co. (Pa.), p. 395, vol. 24 (1 R R R).

Negligence of engineer in failing to see child on track in time to avoid accident.

Texas & P. Ry. Co. *v.* Harby (Tex.), p. 602, vol. 25 (2 R R R).

Negligence of father and mother in not discovering train, imputable to child.

Delaware, L. & W. R. Co. *v.* Devore (C. C. A.), p. 300, vol. 27 (4 R R R).

Prima facie evidence of negligence in action for injury to boy sustained while he was attempting to climb over train obstructing crossing.

Todd *v.* Philadelphia & R. Ry. Co. (Pa.), p. 37, vol. 25 (2 R R R).

Question for jury whether injuries to child struck by street car were caused by negligence.

Nolder *v.* McKeesport, W. & D. Ry. Co. (Pa.), p. 396, vol. 24 (1 R R R).

Question for jury whether negligence in failing to stop train to avoid injuring boy playing on side of stationary car.

O'Donnell *v.* Chicago, R. I. & P. R. Co. (Neb.), p. 701, vol. 27 (4 R R R).

Question for jury whether torpedo injuring boy was placed on track by trainman for his own amusement.

Euting *v.* Chicago & N. W. Ry. Co. (Wis.), p. 513, vol. 28 (5 R R R).

Res gestæ in action by father for injury to minor son.

Illinois Cent. R. Co. *v.* Henon (Ky.), p. 145, vol. 26 (3 R R R).

**CHILDREN—Continued.**

Right of action by mother, under Washington statute, for death of child.

Clark *v.* Northern Pac. Ry. Co. (Wash.), p. 755, vol. 27 (4 R R R).

Right of motorman to assume that child seven years old will exercise care.

Citizens' St. R. Co. *v.* Hamer (Ind.), p. 9, vol. 25 (2 R R R).

Right to catch and lecture boy stealing ride.

Palmisano *v.* New Orleans City R. Co. (La.), p. 753, vol. 27 (4 R R R).

Right to leave train on switch track.

Flores *v.* Atchison, T. & S. F. Ry. Co. (Tex.), p. 709, vol. 24 (1 R R R).

Right to recover for impairment of earning capacity of minor.

Chicago, B. & Q. R. Co. *v.* Krayenbuhl (Neb.), p. 35, vol. 28 (5 R R R).

Scope of engineer's employment where child was injured by torpedo placed upon track for former's amusement.

Euting *v.* Chicago & N. W. Ry. Co. (Wis.), p. 513, vol. 28 (5 R R R).

Sufficiency of evidence of street railway company's negligence in action for running over child.

Welsh *v.* United Traction Co. (Pa.), p. 595, vol. 25 (2 R R R).

Sufficiency of evidence to show that turntable was insecurely fastened.

Edgington *v.* Burlington, C. R. & N. Ry. Co. (Iowa), p. 249, vol. 27 (4 R R R).

The fact that immediate cause of injury to child was the act of its playmates in unfastening and operating insecurely fastened turntable was no defense.

Edgington *v.* Burlington, C. R. & N. Ry. Co. (Iowa), p. 247, vol. 27 (4 R R R).

Two hundred and fifty dollars not grossly inadequate for death of boy between eleven and twelve years of age.

Snyder *v.* Lake Shore & M. S. Ry. Co. (Mich.), p. 283, vol. 28 (5 R R R).

**CHILDREN—Continued.**

Wilful or reckless misconduct not shown where boy was injured on tracks after passing through freight yard, and it did not appear that company maintained any way across yard which public were invited to use.

Byrnes *v.* Boston & M. R. R. (Mass.), p. 600, vol. 26 (3 R R R).

**CINDERS.**

*See Railroads in Streets.*

**CIRCUMSTANTIAL EVIDENCE.**

*See Fires.*

**CITIES.**

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**CITIZENSHIP.**

*See Public Lands.*

**CITY COUNCIL.**

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**CLASS LEGISLATION.**

*See Constitutional Law.  
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**COAL BINS.**

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**COLLATERAL ATTACK.**

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**COLLISIONS.**

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Crossings.  
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**COMBUSTIBLES.**

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**COMMERCIAL RAILWAYS.**

*See Street Railways.*

**COMMISSIONS.**

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**COMMON CARRIERS.**

*See Carriers of Goods.  
Carriers of Live Stock.  
Carriers of Passengers.  
Connecting Carriers.  
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**COMMON CARRIERS—Cont'd.****Limiting Liability.**

Notice of claim for injury.

Atchison, etc., Ry. Co. *v.*  
Morris (Kan.), p. 588, vol.  
28 (5 R R R).

Railroad company cannot be  
compelled to maintain and  
operate road at actual loss.

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10, vol. 26 (3 R R R).

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of its road as common carrier,  
not a public officer.

Lyons *v.* Rutland R. Co. (Vt.),  
p. 27, vol. 26 (3 R R R).

**COMPENSATION.**

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**COMPLETE LINES.**

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**COMPRESS.**

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**CONCURRENENT NEGLIGENCE.**

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**CONDEMNATION PROCEEDINGS.**

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Liability for injury to passen-  
ger sustained in another state.  
Louisville & N. R. Co. *v.*  
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**CONNECTING CARRIERS.**

*See Carriers of Freight.  
Instructions.  
Shipping Receipts.  
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Burden of proving that agent  
of initial carrier had authority  
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McLagan *v.* Chicago & N. W.  
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24 (1 R R R).

**CONNECTING CARRIERS—  
Continued.**

Burden on carrier where goods  
are injured by water to show  
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Mears *v.* New York, N. H. &  
H. R. Co. (Conn.), p. 668, vol.  
26 (3 R R R).

Company contracting to ship  
cattle over its own and con-  
necting line and sued for in-  
jury occurring on connecting  
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Texas & P. Ry. Co. *v.* Mc-  
Carty (Tex.), p. 654, vol. 26  
(3 R R R).

Declaration of defendant com-  
pany's conductor as to evi-  
dence as to when train was  
due at connecting point.

San Antonio & A. P. Ry. Co.  
*v.* Barnett (Tex.), p. 789,  
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Effect of contract where receiv-  
ing carrier does not contract  
for itself beyond its line.

Hughes *v.* Pa. R. Co. (Pa.), p.  
925, vol. 25 (2 R R R).

Effect where initial carrier re-  
ceives fruit in good condition  
but delivers to connecting car-  
rier in bad condition.

Missouri, K. & T. Ry. Co. *v.*  
Mazze (Tex.), p. 950, vol.  
25 (2 R R R).

General denial by defendant  
raised issue whether state-  
ments of initial carrier's agent  
with respect to rates of con-  
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McLagan *v.* Chicago & N. W.  
Ry. Co. (Iowa), p. 566, vol.  
24 (1 R R R).

Implied authority of agent to  
solicit traffic for foreign rail-  
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principal for safe delivery of  
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Fremont, etc., R. Co. *v.* New  
York, etc., R. Co. (Neb.), p.  
470, vol. 28 (5 R R R).

New York, etc., R. Co. *v.*  
Fremont, etc., R. Co. (Neb.),  
p. 470, vol. 28 (5 R R R).

Initial carrier not bound by  
statements of its agent as to  
rates of connecting carrier.

McLagan *v.* Chicago & N.  
W. Ry. Co. (Iowa), p. 566,  
vol. 24 (1 R R R).

**CONNECTING CARRIERS—**  
*Continued.*

Initial carrier only required to put stock in suitable pen.

Central Stock Yards Co. *v.* Louisville & N. R. Co. (C. C. A.), p. 259, vol. 28 (5 R R R).

Initial carrier was not guilty of unlawful discrimination, in violation of interstate commerce act, by placing cattle in suitable pens instead of delivering them to connecting carrier.

Central Stock Yards Co. *v.* Louisville & N. R. Co. (C. C. A.), p. 259, vol. 28 (5 R R R).

In the absence of statutory provision, courts have no power to compel exchange of traffic between connecting lines.

Central Stock Yards Co. *v.* Louisville & N. R. Co. (C. C. A.), p. 259, vol. 28 (5 R R R).

Liability for injury on connecting line, under bill of lading providing that carrier shall not be liable for loss not proved to have occurred on his own line.

Dunbar *v.* Charleston & W. C. Ry. Co. (S. Car.), p. 761, vol. 24 (1 R R R).

Liability for loss by fire of goods ready for delivery to connecting carrier, where specific and general clauses limiting liability.

Texas & Pacific Ry. Co. *v.* Callender (U. S.), p. 186, vol. 24 (1 R R R).

Liability for loss of goods deposited on company's pier for delivery to succeeding carrier.

Texas & Pacific Ry. Co. *v.* Callender (U. S.), p. 186, vol. 24 (1 R R R).

Liability for loss of goods unloaded by connecting carrier on his pier, prior to notice to succeeding carriers.

Texas & Pacific Ry. Co. *v.* Reiss (U. S.), p. 178, vol. 24 (1 R R R).

Liability for loss on connecting line, construction of contract.

Taffe *v.* Oregon R. Co. (Ore.), p. 754, vol. 24 (1 R R R).

Liability for negligence of connecting carrier.

Hartley *v.* St. Louis, K. & N. W. R. Co. (Iowa), p. 569, vol. 24 (1 R R R).

**CONNECTING CARRIERS—**  
*Continued.*

Liability for negligence of connecting carrier under statute of Georgia.

Felton *v.* Central of Georgia Ry. Co. (Ga.), p. 575, vol. 24 (1 R R R).

Liability of connecting carrier where initial carrier receives goods to be transported over lines of several connecting carriers.

Chicago, R. I. & P. Ry. Co. *v.* Western Hay & Grain Co. (Neb.), p. 953, vol. 25 (2 R R R).

Liability of delivering carrier where decay of fruit began on initial line.

Missouri, K. & T. Ry. Co. *v.* Mazzie (Tex.), p. 950, vol. 25 (2 R R R).

Liability where stock is loaded beyond initial carrier's terminus and bill of lading is accepted from connecting carrier.

Hartley *v.* St. Louis, etc., R. Co. (Iowa), p. 569, vol. 24 (1 R R R).

**Limiting Liability.**

Carrier is not prevented by public policy from limiting its liability to its own line.

Hartley *v.* St. Louis, K. & N. W. R. Co. (Iowa), p. 569, vol. 24 (1 R R R).

Connecting carrier not named in receipt entitled to benefit of provision.

Mears *v.* New York, etc., R. Co. (Conn.), p. 668, vol. 26 (3 R R R).

Liability for improper treatment of cattle as affected by fact that each connecting carrier limited its liability to its own line.

Gulf, C. & S. F. Ry. Co. *v.* Houghton (Tex.), p. 697, vol. 26 (3 R R R).

Liability for injury on connecting line where stipulation that liability shall cease at initial carrier's terminus.

Pittsburg, C., C. & St. L. R. Co. *v.* Viers (Ky.), p. 62, vol. 26 (3 R R R).

Negligence of connecting carrier, construction of Iowa statute.

Hartley *v.* St. Louis, K. & N. W. R. Co. (Iowa), p. 569, vol. 24 (1 R R R).

**CONNECTING CARRIERS—**  
*Continued.*

Sufficiency of evidence whether initial carrier limited its liability to its own line.

Hartley *v.* St. Louis, K. & N. W. R. Co. (Iowa), p. 569, vol. 24 (1 R R R).

To own line.

Fremont, E. & M. V. R. Co. *v.* New York, C. & St. L. R. Co. (Neb.), p. 470, vol. 28 (5 R R R).

New York, C. & St. L. R. Co. *v.* Fremont, E. & M. V. R. Co. (Neb.), p. 470, vol. 28 (5 R R R).

Where contract is made in one state and injury ensues in another.

Hughes *v.* Pennsylvania R. Co. (Pa.), p. 925, vol. 25 (2 R R R).

Misleading instruction as to apportionment of damages in action for delay in shipment. Gulf, C. & S. F. Ry. Co. *v.* Cushney (Tex.), p. 89, vol. 25 (2 R R R).

Negligence not inferred from mere fact that goods are wet while in carrier's possession. Mears *v.* New York, etc., R. Co. (Conn.), p. 668, vol. 26 (3 R R R).

Presumption that injury to goods occurred on last line. Cote *v.* New York, N. H. & H. R. Co. (Mass.), p. 270, vol. 28 (5 R R R).

Question for jury, whether damage occurred on initial line. Missouri, K. & T. Ry. Co. *v.* Mazzie (Tex.), p. 950, vol. 25 (2 R R R).

Railway company contracting to ship cattle from its own and connecting line to certain point was liable for injury occurring on connecting line. Texas & P. Ry. Co. *v.* McCarty (Tex.), p. 654, vol. 26 (3 R R R).

Receiving carrier as agent for connecting carrier. Hughes *v.* Pa. R. Co. (Pa.), p. 925, vol. 25 (2 R R R).

Right of connecting carrier to action over against other carriers.

Ft. Worth & R. G. Ry. Co. *v.* Reese (Tex.), p. 673, vol. 26 (3 R R R).

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**CONNECTING CARRIERS—**  
*Continued.*

State cannot compel transfer of cars of live stock to connecting road where shipment is subject to interstate commerce. Central Stock Yards Co. *v.* Louisville & N. R. Co. (C. C. A.), p. 259, vol. 28 (5 R R R).

Transportation of freight over connecting lines after its arrival at destination named in bill of lading.

Missouri, K. & T. Ry. Co. *v.* Mazzie (Tex.), p. 950, vol. 25 (2 R R R).

Venue of action where ratification by connecting carrier of original contract of initial carrier.

Pittsburg, C., C. & St. L. Ry. Co. *v.* Viers (Ky.), p. 62, vol. 26 (3 R R R).

Waybill afforded no proof of partnership or agency between defendant and connecting carrier.

San Antonio & A. P. Ry. Co. *v.* Barnett (Tex.), p. 789, vol. 24 (1 R R R).

What constitutes awaiting further conveyances.

Texas & Pacific Ry. Co. *v.* Reiss (U. S.), p. 178, vol. 24 (1 R R R).

**CONSIGNEES.**

*See Carriers of Freight.*  
*Carriers of Goods.*

**CONSIGNORS.**

*See Carriers of Freight.*  
*Carriers of Goods.*

**CONSOLIDATION.**

*See Contracts.*  
*Jurisdiction.*

Inserting name of another company as defendant where action had been brought before consolidation.

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- Directing verdict, in action for wrongful death, against lessee operating roads, when accident due to their negligence.  
*Suburban R. Co. v. Balkwill* (Ill.), p. 784, vol. 25 (2 R R R).
- Duty of motorman to look out for children.  
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- Duty of street railway constructing its track across steam railroad to perpetually maintain and repair crossing according to direction of engineer of steam road.  
*Central Pass. Ry. Co. v. Philadelphia, etc., R. Co.* (Md.), p. 392, vol. 27 (4 R R R).
- Duty to employee crossing track at public crossing when off duty.  
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- Duty to give warning before starting train.  
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Duty to keep bridge in repair, instruction.

Denison & P. S. Ry. Co. *v.* Foster (Tex.), p. 576, vol. 26 (3 R R R).

Duty to maintain railing where right of way over path has been acquired by prescription. Baldwin *v.* Boston & M. R. R. (Mass.), p. 607, vol. 25 (2 R R R).

Duty to provide crossing where land inside city limits, under Kansas statute requiring railroad companies to fence and provide farm crossings where road runs through cultivated lands.

Smith *v.* Missouri, K. & T. Ry. Co. (Mo.), p. 599, vol. 26 (3 R R R).

**Evidence.**

Engineer's testimony that he did not know of anything more he could have done to stop train than he had done was properly admitted.

McGovern *v.* Smith (Vt.), p. 541, vol. 28 (5 R R R).

Error in excluding evidence that bridge appeared to be properly constructed.

Denison & P. S. Ry. Co. *v.* Foster (Tex.), p. 576, vol. 26 (3 R R R).

Evidence of declaration of trainmen not part of res gestæ, but mere hearsay, in action for injury caused by defect in bridge.

Denison & P. S. Ry. Co. *v.* Foster (Tex.), p. 576, vol. 26 (3 R R R).

Plaintiff's testimony as to his general habit of looking for cars at crossing.

Nashville Ry. *v.* Norman (Tenn.), p. 350, vol. 27 (4 R R R).

Extent of right of street railway to obstruct public use of crossing.

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Failure of trainmen to anticipate that boy would attempt to pass between cars blocking street. Thompson *v.* Missouri, K. & T. Ry. Co. (Mo.), p. 832, vol. 25 (2 R R R).

**CROSSINGS—Continued.****Farm Crossings.**

Duty to provide crossing where land inside city limits, under Kansas statute requiring railroad companies to fence and provide farm crossings where road runs through cultivated lands.

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**Flagmen.**

Assumption of duty to maintain flagman not required by law.

Wolcott *v.* New York & L. B. R. Co. (N. J.), p. 547, vol. 28 (5 R R R).

Failure to keep flagman in absence of statutory requirement.

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Flagman's negligence question for jury where person was injured at night.

Wolcott *v.* New York & L. B. R. Co. (N. J.), p. 547, vol. 28 (5 R R R).

Punitive damages for gross negligence.

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Right of city to indemnity from railroad where damages were recovered against it for personal injuries caused by dangerous approach to bridge erected by railroad under contract with city.

Gulf, C. & S. F. Ry. Co. *v.* Sandifer (Tex.), p. 387, vol. 27 (4 R R R).

Right of traveler to rely on flagman's invitation to cross, instruction.

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Dolph *v.* New York, N. H. & H. R. Co. (Conn.), p. 35, vol. 25 (2 R R R).

**Gates.**

Error in instructing that single isolated circumstance of failure to operate gates was negligence.

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*v. Durand (Kan.)*, p. 519, vol. 26 (3 R R R).

Negligence of gateman in raising safety gates and thereby permitting child of 6½ years old to pass on track was a question for the jury.

*Tabello v. Delaware, L. & W. R. Co. (N. J.)*, p. 702, vol. 27 (4 R R R).

Railroad may be required to maintain crossing and keep gates or flagman thereat in granting a petition of city for condemnation of land for street extension across railroad.

*Chicago & N. W. Ry. Co. v. City of Morrison, (Ill.)*, p. 807, vol. 24 (1 R R R).

Street railway company constructing its tracks across steam railroad not required to maintain crossing gates and other safety appliances at crossing.

*Central Pass. Ry. Co. v. Philadelphia, etc., R. Co. (Md.)*, p. 392, vol. 27 (4 R R R).

**Grade Crossings.**

In absence of statute grade crossings of a street or highway over a railroad cannot be restrained.

*Philadelphia & B. C. R. Co. v. Upper Darby Tp. (Pa.)*, p. 760, vol. 25 (2 R R R).

Gross negligence in failing to maintain lookout when approaching street crossing.

*Louisville & N. R. Co. v. Cooper (Ky.)*, p. 230, vol. 24 (1 R R R).

Hand car as an unsightly object at crossing.

*International & G. N. R. Co. v. Locke (Tex.)*, p. 754, vol. 25 (2 R R R).

Imputed negligence of driver.

*Atchison, T. & S. F. Ry. Co. v. Judah (Kan.)*, p. 937, vol. 27 (4 R R R).

Imputed negligence, Ohio doctrine.

*New York, etc., R. Co. v. Kistler (Ohio)*, p. 340, vol. 27 (4 R R R).

Instructions as to duty to regulate speed of cars at crossing properly refused for ignoring contributory negligence.

*West Chicago St. R. Co. v. Petters (Ill.)*, p. 612, vol. 25 (2 R R R).

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Instruction with respect to speed and failure to signal properly denied as given undue prominence to certain facts.

*Sherwin v. Rutland R. Co. (Vt.)*, p. 602, vol. 26 (3 R R R).

Instruction with respect to trainmen's negligence after discovering plaintiff's peril not warranted by evidence.

*Sherwin v. Rutland R. Co. (Vt.)*, p. 602, vol. 26 (3 R R R).

Insufficiency of averment to show contributory negligence in attempting to drive around a hand car.

*International & G. N. R. Co. v. Locke (Tex.)*, p. 754, vol. 25 (2 R R R).

Insufficiency of evidence to sustain action for wilful injury.

*Bonham v. Citizens' St. R. Co. (Ind.)*, p. 787, vol. 25 (2 R R R).

It is proper, in action for injuries at a railroad crossing, to submit to jury a question as to width of crossing or traveled place.

*Davis v. Atlanta & C. A. L. Ry. Co. (S. Car.)*, p. 317, vol. 26 (3 R R R).

Jurisdiction to order construction of bridge for support of track where railroad has constructed spur track across highway, construction of laws of Connecticut.

*Appeal of New York, N. H. & H. R. Co. (Conn.)*, p. 158, vol. 28 (5 R R R).

Liability for injury caused by suddenly and without warning backing freight train against person lawfully using public crossings.

*Meeks v. Ohio River Ry. Co. (W. Va.)*, p. 662, vol. 28 (5 R R R).

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*Davis v. Atlanta & C. A. L. Ry. Co. (S. Car.)*, p. 317, vol. 26 (3 R R R).

Liability of railroad for defect in design of bridge constructed under agreement between it and a borough council.

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Liability of railroad in city on



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- account of dangerous approaches.  
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- Liability of railroad in city on account of dangerous approach to bridge.  
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- Liability of street railway for personal injury caused by pile of snow in street.  
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- Liability where private crossing is in such bad condition, that stock escaped from land adjoining railroad and were killed upon the track.  
Houston & T. C. Ry. Co. *v.* Hollingsworth (Tex.), p. 905, vol. 25 (2 R R R).
- Lookout.  
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- Mandamus as proper remedy to compel railroad company to restore highways, as required by statute.  
Chicago, etc., Ry. Co. *v.* State ex rel. Zimmerman (Ind.), p. 813, vol. 25 (2 R R R).
- Motorman of street car was negligent in failing to give warning of his car's approach, though the place of the accident was not at a street crossing, where it appeared that the view was unobstructed.  
Fenner *v.* Wilkesbarre & W. V. Traction Co. (Pa.), p. 617, vol. 25 (2 R R R).
- Negligence of engineer after discovering plaintiff's peril.  
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- Negligence of flagman in failing to warn traveler.  
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- Negligence of street railway in piling snow in street, instruction.  
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- Not negligence per se to fail to have brakeman on rear car when backing train.  
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- Obstruction of crossing by railroad company.  
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- Right of licensees having implied invitation to use opening between portions of train as passageway to notice of closing of space.  
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- Right of motorman to presume that persons approaching will use ordinary care.  
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- Right to cross right of way of another company.  
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- Roadway left in dangerous condition.  
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- Running train backwards as negligence.  
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Burden of proof on railroad company to show want of care in plaintiff where failure to give signals.

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*Jones v. Lehigh & N. E. R. Co. (Pa.)*, p. 26, vol. 25 (2 R R R).

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Duty of street railway company.

*Adams v. Wilmington & N. Electric Ry. Co. (Del.)*, p. 307, vol. 27 (4 R R R).

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*Boggero v. Southern Ry. Co. (S. Car.)*, p. 376, vol. 27 (4 R R R).

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Evidence of failure to signal another crossing.

*Chicago, R. I. & P. Ry. Co. v. Durand (Kan.)*, p. 519, vol. 26 (3 R R R).

Failure to give, question for jury.

*Haines v. Lake Shore & M. S. Ry. Co. (Mich.)*, p. 627, vol. 24 (1 R R R).

Failure to give signals at street crossings as negligence.

*Louisville & N. R. Co. v. Cooper (Ky.)*, p. 230, vol. 24 (1 R R R).

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*Edwards v. Southern Ry. Co. (S. Car.)*, p. 761, vol. 25 (2 R R R).

Failure to give signals of approaching train.

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accident was at point beyond crossing.

*Boggero v. Southern Ry. Co. (S. Car.)*, p. 376, vol. 27 (4 R R R).

Failure to give signals where accident was not at crossing, effect.

*San Antonio & A. P. Ry. Co. v. Gray (Tex.)*, p. 828, vol. 25 (2 R R R).

Failure to give statutory signals, no excuse for contributory negligence when accident was caused by plaintiff's failure to look and listen.

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Failure to signal and contributory negligence in failure to stop, look and listen.

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Gross negligence in approaching street crossings without giving signals.

*Louisville & N. R. Co. v. Cooper (Ky.)*, p. 230, vol. 24 (1 R R R).

Inadmissibility of evidence as to blowing of whistles when witness' statements are inconsistent.

*Olson v. Oregon Short Line R. Co. (Utah)*, p. 797, vol. 25 (2 R R R).

Liability for accident at crossing as affected by failure to maintain bells not required by law.

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- Co. (Wash.), p. 218, vol. 24 (1 R R R).
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- Not error to allow conductor to testify that he made a remark to engineer at time of accident, in order to sustain his testimony as to giving of signals.
- Dolph *v.* New York, N. H. & H. R. Co. (Conn.), p. 35, vol. 25 (2 R R R).
- Not intended for protection of person on track not at crossing.
- Cleveland, A. & C. Ry. Co. *v.* Workman (Ohio), p. 551, vol. 27 (4 R R R).
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- Question for jury where evidence was conflicting as to whether signals were given.
- Corcoran *v.* Pennsylvania R. Co. (Pa.), p. 523, vol. 28 (5 R R R).
- Statute providing for the sounding of whistles before crossing is reached is a police regulation and not an inference with interstate commerce.
- Bonham *v.* Citizens' St. R. Co. (Ind.), p. 787, vol. 25 (2 R R R).
- Sufficiency of evidence to show failure to give proper signals.
- St. Louis S. W. Ry. Co. of Texas *v.* Carwile (Tex.), p. 804, vol. 25 (2 R R R).
- Sufficiency of sounding of gong, in exercise of care, to justify finding for defendant in accident for injury at crossing.
- Bonham *v.* Citizens' St. R. Co. (Ind.), p. 787, vol. 25 (2 R R R).
- Under S. Car. Rev. Statutes, sec. 1692, providing that if a person is injured at a railroad crossing, and the railroad company fails to give statutory signals it shall be liable, unless person injured was guilty of wilful negligence, contributing to the injury, failure to ring the

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- bell or blow the whistle is negligence per se.
- Davis *v.* Atlanta & C. A. L. Ry. Co. (S. Car.), p. 317, vol. 26 (3 R R R).
- Whether signals were given when evidence is conflicting is a question for the jury.
- Chesapeake & O. Ry. Co. *v.* Dupee (Ky.), p. 818, vol. 25 (2 R R R).
- Whistle not required to be blown before crossing street which is less than eighty rods from starting point, under Texas statute requiring whistle to be blown at a distance of at least eighty rods from point where railroad crosses public road or street.
- Ft. Worth & R. G. Ry. Co. *v.* Greer (Tex.), p. 387, vol. 27 (4 R R R).
- Speed.**
- Country crossings.
- Atchison, T. & S. F. Ry. Co. *v.* Judah (Kan.), p. 937, vol. 27 (4 R R R).
- Counts alleging that defendant's servant, knowing that by running train at rapid rate of speed at street crossing great personal injury would likely be caused, wantonly and intentionally did so, and, as a proximate consequence thereof, plaintiff was injured, did not state a cause of action.
- Central of Georgia Ry. Co. *v.* Freeman (Ala.), p. 62, vol. 28 (5 R R R).
- Negligence of street railway.
- Bass *v.* Norfolk Ry. & Light Co. (Va.), p. 194, vol. 24 (1 R R R).
- Objection to evidence as to speed of train without stating any specified ground is too general.
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**Stop, Look and Listen.**

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Contributory negligence in failing to stop before crossing car track, question for jury.

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Contributory negligence where view was obstructed.

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*Louisville & N. R. Co. v. Cooper (Ky.)*, p. 230, vol. 24 (1 R R R).

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*Selma Street & Suburban Ry. Co. v. Owen (Ala.)*, p. 97, vol. 25 (2 R R R).

Duty to look for cars before crossing street railway track.

*Nashville Ry. v. Norman (Tenn.)*, p. 350, vol. 27 (4 R R R).

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(Pa.), p. 810, vol. 25 (2 R R R).

Duty to stop just before going on track where view had been obstructed.

*Peck v. Oregon Short Line R. Co. (Utah)*, p. 358, vol. 27 (4 R R R).

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*Haas v. Chester St. Ry. Co. (Pa.)*, p. 810, vol. 25 (2 R R R).

Failure to give statutory signals no excuse for contributory negligence where accident was caused by plaintiff's failure to look and listen.

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Failure to look at points where train could have been seen in time, negligence per se.

*Chicago, I. & L. Ry. Co. v. Reed (Ind.)*, p. 627, vol. 26 (3 R R R).

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*Haas v. Chester St. Ry. Co. (Pa.)*, p. 810, vol. 25 (2 R R R).

Failure to stop before crossing street car track as showing negligence, is question for jury.

*Haas v. Chester St. Ry. Co. (Pa.)*, p. 810, vol. 25 (2 R R R).

Failure to stop, look and listen after passing train obstructing view.

*Cleveland, etc., Ry. Co. v. Heine (Ind.)*, p. 948, vol. 24 (1 R R R).

Failure to stop, look and listen is not negligence as matter of law, but question for the jury, under the circumstances.

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- Peremptory instruction erroneous where surroundings rendered it difficult to see and hear train until within a few feet of track.
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- Question for jury whether there was another and better place to stop.
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Smethport R. Co. *v.* Pittsburgh, S. & N. R. Co. (Pa.), p. 368, vol. 27 (4 R R R).

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Where driver negligently drove on track of rapidly approaching electric car, accident may properly be attributed to his negligence, though vehicle was carried some distance along track before it was overturned and injuries inflicted.

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Aldrich *v.* Metropolitan W. S. El. R. Co. (Ill.), p. 473, vol. 25 (2 R R R).

Right to compensation for procuring property owners consent to construction of elevated

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railroad, construction of contract.

Union El. R. Co. *v.* Nixon (Ill.), p. 370, vol. 28 (5 R R R).

Right to bonus under contract to procure consent to construction of elevated railroad.

Union El. R. Co. *v.* Nixon (Ill.), p. 370, vol. 28 (5 R R R).

**EMINENT DOMAIN.***See Damages.**Elevated Railroads.**Injunctions.**Instructions.**Pleading.**Right of Way.**Stations and Depots.*

A judgment awarding permanent damages to landowner for unauthorized appropriation by telegraph company of right of way, confers same rights as condemnation.

Phillips *v.* Postal Tel. Cable Co. (N. Car.), p. 147, vol. 28 (5 R R R).

Appropriation of right of way by telegraph company without compensation is in violation of provision of federal constitution against taking property without due process of law.

Phillips *v.* Postal Tel. Cable Co. (N. Car.), p. 147, vol. 28 (5 R R R).

Authority of commissioners under Colorado statute to determine whether taking was for private use.

Union Pac. R. Co. *v.* Colorado Postal Tel. Cable Co. (Colo.), p. 349, vol. 28 (5 R R R).

Collateral attack cannot be made on right of city to condemn land.

South Chicago City Ry. Co. *v.* City of Chicago (Ill.), p. 484, vol. 26 (3 R R R).

Conclusiveness of judgment.

Davidson *v.* Texas & N. O. R. Co. (Tex.), p. 660, vol. 25 (2 R R R).

Condemnation not invalid as being a taking without compensation where compensation is deposited in court and possession taken before determination of rights.

Davidson *v.* Texas & N. O. R.

Co. (Tex.), p. 660, vol. 25 (2 R R R).

Condemnation not invalid if commissioners fail to apportion damages when title cannot be determined in county court.

Davidson *v.* Texas & N. O. R. Co. (Tex.), p. 660, vol. 25 (2 R R R).

Condemnation of right of way for railroad over land previously condemned by city did not effect an abandonment, so as to work a reversion to owner of naked fee.

Newton *v.* Manufacturers' Ry. Co. (C. C. A.), p. 739, vol. 28 (5 R R R).

Constitutionality of Texas statute permitting possession before payment of damages.

Davidson *v.* Texas & N. O. R. Co. (Tex.), p. 660, vol. 25 (2 R R R).

**Damages.**

Benefit to land not taken.

Beveridge *v.* Lewis (Cal.), p. 83, vol. 26 (3 R R R).

Constitutional clause providing that damages may be assessed irrespective of benefits repugnant to 14th amendment of federal constitution.

Beveridge *v.* Lewis (Cal.), p. 83, vol. 26 (3 R R R).

Constitutionality of Massachusetts statute removing bar of limitation to filing petition to have damages assessed.

Dunbar *v.* Boston & P. R. Corp. (Mass.), p. 382, vol. 26 (3 R R R).

Construction of spur track over plaintiff's land.

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Damages for injury to non-abutting property from change of grade of street.

Putnam *v.* Boston & P. R. Corp. (Mass.), p. 721, vol. 28 (5 R R R).

Damages recoverable against railroad in possession of land under defective condemnation proceedings.

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Injuries to easements of light, air and access.

State ex rel. *Smith v. Superior Court of King County* (Wash.), p. 762, vol. 28 (5 R R R).

Massachusetts statute removing bar of limitation to filing petition to have damages assessed is not invalid as class legislation, because, while applicable to other railroads, terminal companies are exempt from its operation.

*Dunbar v. Boston & P. R. Corp.* (Mass.), p. 382, vol. 26 (3 R R R).

Measure of damages in condemnation proceedings to secure right of way.

*Lough v. Minneapolis & St. L. R. Co.* (Iowa), p. 375, vol. 25 (2 R R R).

Measure of damages for taking private way appurtenant to land.

*Neff v. Pennsylvania R. Co.* (Pa.), p. 843, vol. 25 (2 R R R).

Nominal damages for constructing telegraph line over railroad right of way.

*Postal Tel. Cable Co. of Montana v. Oregon Short Line R. Co.* (Mont.), p. 432, vol. 26 (3 R R R).

On condemnation by railroad of land occupied by it, damages are to be awarded from time of entry.

*Van Husen v. Omaha Bridge & T. Ry. Co.* (Iowa), p. 399, vol. 28 (5 R R R).

Punitive damages not recoverable against railroad in possession of land under defective condemnation proceedings.

*Illinois Cent. R. Co. v. Hoskins* (Miss.), p. 469, vol. 27 (4 R R R).

Recovery of permanent damages under statutes of North Carolina where unlawful appropriation of land for right of way by telegraph company.

*Phillips v. Postal Tel. Cable Co.* (N. Car.), p. 147, vol. 28 (5 R R R).

Right of jurors to exercise individual judgment in as-

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sessing damages.

*Beveridge v. Lewis* (Cal.), p. 83, vol. 26 (3 R R R).

Determination of railroad's right to condemn land of another company could not be collaterally attacked.

*Chesapeake & W. R. Co. v. Washington, C. & St. L. Ry. Co.* (Va.), p. 444, vol. 26 (3 R R R).

Duty of company to construct adequate crossing to be considered in estimating damages.

*Lough v. Minneapolis & St. L. R. Co.* (Iowa), p. 375, vol. 25 (2 R R R).

Easement, deprivation of so as to start running of statute.

*Neff v. Pennsylvania R. Co.* (Pa.), p. 843, vol. 25 (2 R R R).

Eating houses for public accommodation for a public purpose.

*Abraham v. Oregon & C. R. Co.* (Ore.), p. 111, vol. 28 (5 R R R).

Ejectment against railroad company in possession of land under defective condemnation proceedings.

*Illinois Cent. R. Co. v. Hoskins* (Miss.), p. 469, vol. 27 (4 R R R).

Electric plant as an additional burden on highway.

*Schaaf v. Cleveland, M. & S. Ry. Co.* (Ohio), p. 832, vol. 27 (4 R R R).

Enjoining statutory condemnation proceedings where right to compensation is denied.

*South Bound R. Co. v. Burton* (S. Car.), p. 379, vol. 25 (2 R R R).

Error in valuing parts of land separately.

*Lough v. Minneapolis & St. L. R. Co.* (Iowa), p. 375, vol. 25 (2 R R R).

Estoppel to question regularity of proceedings from acceptance of payment.

*Drouin v. Boston & M. R. Co.* (Vt.), p. 457, vol. 27 (4 R R R).

Evidence tending to show benefits where state authorizes the improvement of a natural drain across right of way.

*Pittsburgh, C., C. & St. L. Ry. Co. v. Machler* (Ind.), p. 388, vol. 25 (2 R R R).

Interest on award.

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- L. R. Co. (Iowa), p. 375, vol. 25 (2 R R R).
- Interurban railway as an additional burden on highway.  
*Schaaf v. Cleveland, M. & S. Ry. Co.* (Ohio), p. 832, vol. 27 (4 R R R).
- Judgment in, not subject to collateral attack.  
*Davidson v. Texas & N. O. R. Co.* (Tex.), p. 660, vol. 25 (2 R R R).
- Jurisdiction to review proceedings where railroad right of way has been condemned by another company, construction of constitution of Washington.  
*Seattle & M. R. Co. v. Bellingham Bay & E. R. Co.* (Wash.), p. 160, vol. 28 (5 R R R).
- Land not needed for railroad purposes may be condemned for another public use.  
*Denver Power & Irrigation Co. v. Denver, etc., R. Co.* (Colo.), p. 822, vol. 27 (4 R R R).
- Laws 1890 of New York, c. 565, do not permit a railroad to select a new terminus in an adjoining county, seven miles from its original terminus, extending its line thereto, where such change is only made for the purpose of increasing the business of the road.  
*Greenwich & J. Ry. Co. v. Greenwich & S. Electric R. R.* (N. Y.), p. 329, vol. 28 (5 R R R).
- Noise from operation of elevated road is not an injury constituting a taking of abutting property, under Illinois constitution.  
*Aldrich v. Metropolitan W. S. El. R. Co.* (Ill.), p. 473, vol. 25 (2 R R R).
- Notice to defendant of collateral attack upon condemnation proceedings before county court.  
*Chesapeake & W. R. Co. v. Washington, C. & St. L. Ry. Co.* (Va.), p. 444, vol. 26 (3 R R R).
- Offsets of benefits.  
*Guyer v. Davenport R. I. & N. W. Ry. Co.* (Ill.), p. 667, vol. 25 (2 R R R).
- Owner of fee, not a party to proceeding, not affected by

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- judgment of condemnation against railroad company conferring right of way upon telegraph company.  
*Phillips v. Postal Tel. Cable Co.* (N. Car.), p. 147, vol. 28 (5 R R R).
- People not entitled to intervene to determine whether the railroad company forfeited its franchise and right to right of way.  
*Denver Power & Irrigation Co. v. Denver, etc., R. Co.* (Colo.), p. 822, vol. 27 (4 R R R).
- Petition for viewers to assess damages for entry on railroad lands cannot be used for recovery for unlawful entry, but only to recover compensation for right with which company becomes vested.  
*Mountz v. Philadelphia, H. & P. R. Co.* (Pa.), p. 416, vol. 26 (3 R R R).
- Petition to have land condemned for telegraph line not insufficient for failing to allege that line was public property.  
*Union Pac. R. Co. v. Colorado Postal Tel. Cable Co.* (Colo.), p. 349, vol. 28 (5 R R R).
- Proceedings for viewers to assess damages for entry of railroad on lands must be by holder of title as owner of lessee; it cannot be by administrator.  
*Connor v. Tennessee Cent. Ry. Co.* (C. C. A.), p. 417, vol. 26 (3 R R R).
- Property sought to be condemned by street railway in a street, within statute of Washington, although it had been dedicated.  
*State ex rel. Smith v. Superior Court of King County* (Wash.), p. 762, vol. 28 (5 R R R).
- Question as to right of telegraph company as a de facto corporation to exercise power of eminent domain can only be raised by state.  
*Postal Tel. Cable Co. of Montana v. Oregon Short Line R. Co.* (Mont.), p. 432, vol. 26 (3 R R R).
- Question as to whether land was public property cannot be lit-

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- igated in supplementary proceedings to pay judgment.  
South Chicago City Ry. Co. *v.* City of Chicago (Ill.), p. 484, vol. 26 (3 R R R).
- Railroad right of way for reservoir site for private water company.  
Denver Power & Irrigation Co. *v.* Denver, etc., R. Co. (Colo.), p. 822, vol. 27 (4 R R R).
- Railroad right of way over land condemned by city for park purposes an additional servitude entitling owner of naked fee to compensation.  
Newton *v.* Manufacturers' Ry. Co. (C. C. A.), p. 739, vol. 28 (5 R R R).
- Remedies where unlawful appropriation of right of way by telegraph company, under statutes of North Carolina.  
Phillips *v.* Postal Tel. Cable Co. (N. Car.), p. 147, vol. 28 (5 R R R).
- Review by certiorari.  
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- Right of appeal where refusal to enjoin condemnation proceedings where right to compensation has been denied.  
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- Right of railroad in possession of land under defective condemnation proceedings to remove improvements.  
Illinois Cent. R. Co. *v.* Hoskins (Miss.), p. 469, vol. 27 (4 R R R).
- Right of subsequent purchasers of land where there has been unlawful appropriation of right of way by telegraph company.  
Phillips *v.* Postal Tel. Cable Co. (N. Car.), p. 147, vol. 28 (5 R R R).
- Right of telegraph company as a de facto corporation to exercise power of eminent domain.  
Postal Tel. Cable Co. of Montana *v.* Oregon Short Line R. Co. (Mont.), p. 432, vol. 26 (3 R R R).
- Right of telegraph company to construct its line over railroad

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- right of way under Montana statute.  
Postal Tel. Cable Co. of Montana *v.* Oregon Short Line R. Co. (Mont.), p. 432, vol. 26 (3 R R R).
- Right to condemn railroad land for right of way of telegraph company.  
Union Pac. R. Co. *v.* Colorado Postal Tel. Cable Co. (Colo.), p. 349, vol. 28 (5 R R R).
- Right to condemn right of way of one company for another.  
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- Right to construct lines over railroad's right of way under federal statute.  
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- Right to question necessity of taking after lapse of 50 years.  
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- Statute governing supplementary proceedings to pay judgment.  
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- Sufficiency of application for certiorari, praying for review of proceedings under which railroad right of way has been condemned by another company, construction of Washington constitution.  
Seattle & M. R. Co. *v.* Bellingham Bay & E. R. Co. (Wash.), p. 160, vol. 28 (5 R R R).
- Sufficiency of evidence to show that land sought to be condemned for telegraph line, by foreign corporation, was desired for private use.  
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- Sufficiency of notice of wish to settle in condemnation proceedings.  
Chesapeake & W. R. Co. *v.* Washington, C. & St. L. Ry. Co. (Va.), p. 444, vol. 26 (3 R R R).
- Summary proceedings to con-

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demn land by internal improvement company before rights over fund paid into court are determined.

*Chesapeake & W. R. Co. v. Washington, C. & St. L. Ry. Co. (Va.)*, p. 444, vol. 26 (3 R R R).

Superior court of Washington has jurisdiction of proceeding by street railway for condemnation for right of way.

*State ex rel. Smith v. Superior Court of King County (Wash.)*, p. 762, vol. 28 (5 R R R).

That spur track constructed over plaintiff's land under defective condemnation proceedings was not an essential part of the main line did not entitle plaintiff to portion of freights as compensation.

*Illinois Cent. R. Co. v. Hoskins (Miss.)*, p. 469, vol. 27 (4 R R R).

Things to be considered in estimating market value.

*Lough v. Minneapolis & St. L. R. Co. (Iowa)*, p. 375, vol. 25 (2 R R R).

Title acquired by condemnation proceedings under statutes of Ohio.

*Newton v. Manufacturers' Ry. Co. (C. C. A.)*, p. 739, vol. 28 (5 R R R).

Title acquired by telegraph company condemning right of way for its line.

*Union Pac. R. Co. v. Colorado Postal Tel. Cable Co. (Colo.)*, p. 349, vol. 28 (5 R R R).

Use of railroad right of way for telegraph purposes an additional servitude affecting rights of owner of fee.

*Phillips v. Postal Tel. Cable Co. (N. Car.)*, p. 147, vol. 28 (5 R R R).

Waiver of right to question whether taking was for public use.

*Union Pac. R. Co. v. Colorado Postal Tel. Cable Co. (Colo.)*, p. 349, vol. 28 (5 R R R).

Where a railroad, in the condemnation of land for right of way fails to proceed in conformity with its legal power, all its acts on the land are trespasses, for which it is liable.

*Illinois Cent. R. Co. v. Hos-*

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*kins (Miss.)*, p. 469, vol. 27 (4 R R R).

Whether right of way was condemned, question for jury.

*Bassett v. Pennsylvania Co. (Pa.)*, p. 522, vol. 25 (2 R R R).

Who are proper parties in condemnation proceedings.

*Davidson v. Texas & N. O. R. Co. (Tex.)*, p. 660, vol. 25 (2 R R R).

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**EMPLOYERS.**

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**EMPLOYERS' LIABILITY ACTS.**

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Application of Minnesota statute creating liability for negligence of fellow servant.

*Williams v. Northern Lumber Co. (Minn.)*, p. 283, vol. 25 (2 R R R).

Common-law liability not enlarged by Indiana statute but restricted so that injuries to employee could not recover unless he was obeying a superior at the time of his injury.

*Thacker v. Chicago, I. & L. Ry. Co. (Ind.)*, p. 772, vol. 27 (4 R R R).

Constitutionality of statutes abrogating the doctrine of assumption of risk.

*Kilpatrick v. Grand Trunk Ry. Co. (Vt.)*, p. 945, vol. 27 (4 R R R).

Hand car within meaning of Texas statute providing that servants shall be liable for damages sustained by any servant or employee while engaged in the work of operating "cars, locomotives or trains" by reason of negligence of any employee, whether fellow servant or not.

*Texas & P. Ry. Co. v. Smith (C. C. A.)*, p. 224, vol. 26 (3 R R R).

Liability for negligence of fellow servant in operating hand car under employers' liability

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act of Texas.

*Perez v. San Antonio & A. P. Ry. Co. (Tex.)*, p. 354, vol. 25 (2 R R R).

Liability under employers' liability act of Indiana for injury to section hand caused by proper order of foreman negligently performed.

*Thacker v. Chicago, I. & L. Ry. Co. (Ind.)* p. 772, vol. 27 (4 R R R).

States may fix by legislative enactment the liabilities of employers for the acts and negligence of their employees. *Southern Pac. Co. v. Schoer (C. C. A.)*, p. 254, vol. 26 (3 R R R).

Statute of Indiana does not enlarge railroad's liability.

*Thacker v. Chicago, I. & L. Ry. Co. (Ind.)*, p. 772, vol. 27 (4 R R R).

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**ESTOPPEL.**

*See Bonds.*

*Corporations.*

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*Street Railways.*

Company partially composed of a consolidation of former company is estopped to set up insolvency of original debtor when sued upon its debt.

*Shadford v. Detroit Y. & A. A. Railway (Mich.)*, p. 845, vol. 25 (2 R R R).

When purchaser of trade fixtures not estopped to claim it.

*Union Terminal Co. v. Wilmar & S. F. Ry. Co. (Iowa)*, p. 676, vol. 25 (2 R R R).

When street railways are estopped to deny prior indebtedness upon consolidation.

*Shadford v. Detroit Y. & A. A. Railway (Mich.)*, p. 845, vol. 25 (2 R R R).

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*Carriers of Goods.*

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Admissibility of evidence of inconsistent statement as to manner in which trains pass over crossing, and concerning the blowing of the whistle.

*Olson v. Oregon Short Line R. Co. (Utah)*, p. 797, vol. 25 (2 R R R).

Admissibility of evidence on question of damages to show impairment of earning capacity.

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Admissibility of evidence on re-direct examination to show reason for not leading team over crossing.

*International & G. N. R. Co. v. Locke (Tex.)*, p. 754, vol. 25 (2 R R R).

Admissibility of evidence when the issue is whether railroad company delivered to the consignee all the goods it received from assignor.

*Missouri, K. & T. Ry. Co. v. Simonson (Kan.)*, p. 940, vol. 25 (2 R R R).

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part of *res gestæ*.

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Burden of proof to show validity and regularity of process where goods are seized in hands of carrier.

*Merz v. Chicago & N. W. R. Co.* (Minn.), p. 931, vol. 25 (2 R R R).

Burden of proving that physician acquired information as to patient's injuries in professional character, under N. Y. Code Civ. Proc., sec. 834.

*Griffiths v. Metropolitan St. Ry. Co.* (N. Y.), p. 407, vol. 26 (3 R R R).

Competency of physician to testify as to patient's condition, under Arkansas statute providing that physicians shall be incompetent to testify concerning information required from patients.

*Haworth v. Kansas City Southern Ry. Co.* (Mo.), p. 235, vol. 26 (3 R R R).

Competency of section man to testify as to speed of train.

*Haworth v. Kansas City Southern Ry. Co.* (Mo.), p. 235, vol. 26 (3 R R R).

Conclusiveness of as to initial carrier's liability where fruit is received in good order but delivered to terminal carrier in bad condition.

*Missouri, K. & T. Ry. Co. v. Mazzie* (Tex.), p. 950, vol. 25 (2 R R R).

Declarations of conductor as to nature of passenger's injury as *res gestæ*.

*Butler v. South Carolina & G. Extension R. Co.* (N. Car.), p. 114, vol. 25 (2 R R R).

Declarations of engineer admissible against himself and not against master where they have been joined as defendants in action for death resulting from negligence of servant.

*Cincinnati, etc., Ry. Co. v. Cook* (Ky.), p. 321, vol. 25 (2 R R R).

Declarations of injured party as *res gestæ*.

*Atchison, etc., Ry. Co. v. Logan* (Kan.), p. 639, vol. 28 (5 R R R).

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of intestate where election is made to sue for pain and suffering.

*Louisville Ry. Co. v. Will* (Ky.), p. 826, vol. 25 (2 R R R).

Evidence as to size of decedent's family.

*Louisville & N. R. Co. v. Banks* (Ala.), p. 359, vol. 25 (2 R R R).

Evidence as to subsequent alteration, in action for injury to employee caused by roof of company's oil-house projecting over track.

*Gulf, C. & S. F. Ry. Co. v. Darby* (Tex.), p. 327, vol. 25 (2 R R R).

Evidence as to whether conductor and brakeman were habitually prudent, in action for injury to passenger.

*Butler v. South Carolina & G. Extension R. Co.* (N. Car.), p. 114, vol. 25 (2 R R R).

Evidence of declaration of trainmen not part of *res gestæ*, but mere hearsay, in action for injury caused by defect in bridge.

*Denison & P. S. Ry. Co. v. Foster* (Tex.), p. 576, vol. 26 (3 R R R).

Evidence that cars blocked a street crossing immaterial, where an attempt is made to go between cars at a point other than at crossing.

*Thompson v. Missouri, K. & T. Ry. Co.* (Mo.), p. 832, vol. 25 (2 R R R).

Expert testimony as to possible cause of accident, in action for death of employee killed on track.

*Louisville & N. R. Co. v. Banks* (Ala.), p. 359, vol. 25 (2 R R R).

Insufficiency of evidence to sustain finding for defendant in action for willful injury to mute at street crossing.

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Objection to evidence as to speed of train should state specific grounds, otherwise too general.

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- to show whether accident could have been avoided.  
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- Plaintiff's testimony as to cause of his weak eyes may be considered although contradicted by that of physician.  
*Birmingham Southern R. Co. v. Cuzzart* (Ala.), p. 312, vol. 26 (3 R R R).
- Privilege communications of patient to physician.  
*Doran v. Cedar Rapids & M. C. Ry. Co.* (Iowa), p. 929, vol. 26 (3 R R R).
- Secondary evidence, introduction of where assignee orders goods to be diverted from destination and they are damaged.  
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- Spontaneous ejaculations caused by suffering.  
*Atchison, etc., Ry. Co. v. Logan* (Kan.), p. 639, vol. 28 (5 R R R).
- Spontaneous ejaculation caused by suffering as self-serving declarations.  
*Atchison, etc., Ry. Co. v. Logan* (Kan.), p. 639, vol. 28 (5 R R R).
- Subsequent precautions admissible as evidence of negligence.  
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- Sufficiency of evidence given by expert bridge builder to show want of ordinary care in master.  
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- Sufficiency of evidence, though conflicting, to establish that neither whistle was blown nor proper signals given at crossing.  
*St. Louis S. W. Ry. Co. of Texas v. Carwile* (Tex.), p. 804, vol. 25 (2 R R R).
- Sufficiency of evidence to show violation of statute to prevent injury to railroads.  
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- Testimony of engineer as to whether his engine was properly managed, in action for injury to employee killed by it.  
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- Weights, specification in bills of lading as conclusive evidence of correctness.  
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- When burden of showing negligence is upon owner of cattle killed, in action against railroad company.  
*Houston & T. C. Ry. Co. v. Hollingsworth* (Tex.), p. 905, vol. 25 (2 R R R).
- When evidence as to negligence in action for death caused by collision justifies the denial of a nonsuit.  
*Olson v. Oregon Short Line R. Co.* (Utah), p. 797, vol. 25 (2 R R R).
- When evidence of failure of master to use ordinary care is sufficient to go to the jury.  
*Dolan v. Sierra Ry. Co. of California* (Cal.), p. 875, vol. 25 (2 R R R).
- When harmless error to permit witness to state that his attention was called to the fact that no signal was given.  
*Willfong v. Omaha & St. L. R. Co.* (Iowa), p. 792, vol. 25 (2 R R R).
- When service of process against corporation must be according to act of congress.  
*Weller v. Pennsylvania R. Co.* (Colo.), p. 702, vol. 25 (2 R R R).
- Where physician acquired information as to how accident happened from injured party while attending him as surgeon, he is not rendered incompetent to testify thereto by N. Y. Code Civ. Proc. sec. 834, unless information was necessary to enable him to act in professional capacity.  
*Green v. Metropolitan St. Ry. Co.* (N. Y.), p. 402, vol. 26 (3 R R R).
- Writings containing competent and incompetent evidence.  
*Southern Pac. Co. v. Schoer* (C. C. A.), p. 254, vol. 26 (3 R R R).

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Administrator sues as trustee and not merely as a formal party under Indiana statute giving right of action for wrongful death.

*Cincinnati, H. & D. R. Co. v. Thiebaud (C. C. A.), p. 26, vol. 27 (4 R R R).*

Foreign corporation becoming domestic corporation under statute of South Carolina is a nonresident of that state for purposes of removal of cause to federal court.

*Calvert v. Southern Ry. Co. (S. Car.), p. 481, vol. 28 (5 R R R).*

**FELLOW SERVANT ACT.**

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**FELLOW SERVANTS.**

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*Master and Servant.*

Acts 1898 of Miss., ch. 65, applies, by its express terms, to injuries to servants resulting from negligence of master alone.

*Bussey v. Gulf & S. I. R. Co. (Miss.), p. 504, vol. 27 (4 R R R).*

Application of employers' liability act of Mississippi.

*Bussey v. Gulf & S. I. R. Co. (Miss.), p. 504, vol. 27 (4 R R R).*

Application of Minnesota statute making railroads liable for injury resulting from the negligence of fellow servant.

*Williams v. Northern Lumber Co. (Minn.), p. 283, vol. 25 (2 R R R).*

Brakeman was agent of company to see that switch was properly set, and not injured

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- engineer's fellow servant.  
**St. Louis S. W. Ry. Co. v. Kelton** (Tex.), p. 279, vol. 25 (2 R R R).
- Car cleaner entitled to recover as a fellow servant of hostler under employers' liability act of Iowa.  
**Jensen v. Omaha & St. L. R. Co.** (Iowa), p. 46, vol. 27 (4 R R R).
- Company liable for injury to section hand caused by negligence of fellow servant, also sectionmen, engaged with him in removing hand car from track.  
**Lindgren v. Minneapolis & St. L. R. Co.** (Minn.), p. 171, vol. 26 (3 R R R).
- Conductor fellow servant of flagman on another train.  
**Hicks v. Southern Ry. Co.** (S. Car.), p. 540, vol. 27 (4 R R R).
- Conductor not a fellow servant of flagman on his own train.  
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- Delegation of authority to fellow servants as relieving master of liability for performance of nonassignable duties, instruction.  
**Dolan v. Sierra Ry. Co. of California** (Cal.), p. 875, vol. 25 (2 R R R).
- Employee of coal company unloading cars not a fellow servant of trainmen negligently shunting cars.  
**Peplinski v. Pennsylvania R. Co.** (Pa.), p. 526, vol. 27 (4 R R R).
- Employee of iron company while loading cars, fellow servant of trainman, under Pennsylvania statute.  
**Weaver v. Philadelphia & R. Ry. Co.** (Pa.), p. 198, vol. 26 (3 R R R).
- Fellow-servant rule not in force in republic of Mexico.  
**Mexican Cent. Ry. Co. v. Knox** (C. C. A.), p. 36, vol. 27 (4 R R R).
- Mexican Cent. Ry. Co. v. Sprague** (C. C. A.), p. 103, vol. 27 (4 R R R).
- Fire knocker not a fellow servant of hostler in charge of engine by which former was injured.  
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- v. Thurmond** (Ark.), p. 149, vol. 26 (3 R R R).
- Foreman not fellow servant of negligent telegraph operator.  
**St. Louis, etc., R. Co. v. Furry** (C. C. A.), p. 54, vol. 27 (4 R R R).
- Foreman of section gang a vice principal under Arkansas statute providing that those entrusted with "authority of superintendence, control or command" are vice principals.  
**Haworth v. Kansas City Southern Ry. Co.** (Mo.), p. 235, vol. 26 (3 R R R).
- Guard of express car and express messenger.  
**Wells, Fargo & Co. v. Page** (Tex.), p. 568, vol. 27 (4 R R R).
- Hand car within meaning of Texas statute providing that railroads shall be liable for all damages sustained by any servant or employee while engaged in the work of operating "cars, locomotives, or trains," by reason of negligence of any employee, whether fellow servant or not.  
**Texas & P. Ry. Co. v. Smith** (C. C. A.), p. 224, vol. 26 (3 R R R).
- Hand injured by negligence of his foreman in detaching brace from building.  
**Missouri, K. & T. Ry. Co. of Texas v. Walden** (Tex.), p. 294, vol. 25 (2 R R R).
- Liability for negligence of fellow servants in operating hand car under Sayles' Ann. Civil Statutes of Texas, art. 4560f.  
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- Liability for negligence of foreman in detaching end of brace from building by rope.  
**Missouri, K. & T. Ry. Co. of Texas v. Walden** (Tex.), p. 294, vol. 25 (2 R R R).
- Liability for negligent act of co-employee while transferring rails from one car to another by use of locomotive moving along track, under Iowa statute, providing that railroads shall be liable for all damages sustained by employees in consequence of negligence of other employees,

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when such wrongs are connected with operation of any railroad.

*Stebbins v. Crooked Creek R. & Coal Co. (Iowa)*, p. 271, vol. 26 (3 R R R).

Liability under employers' liability act of Indiana for injury to section hand caused by proper order of foreman negligently performed.

*Thacker v. Chicago, I. & L. Ry. Co. (Ind.)*, p. 772, vol. 27 (4 R R R).

Liability under Utah statute for negligence of superior servants.

*Southern Pac. Co. v. Schoer (C. C. A.)*, p. 254, vol. 26 (3 R R R).

Liability under Utah statute for negligence of superior servants occurring while they are not exercising superintendence.

*Southern Pac. Co. v. Schoer (C. C. A.)*, p. 254, vol. 26 (3 R R R).

Negligence of fellow servant concurring with negligence of master does not excuse primary negligence of master in injuring another fellow servant.

*Howe v. Northern Pac. Ry. Co. (Wash.)*, p. 624, vol. 28 (5 R R R).

Negligence of fellow servant must be pleaded.

*Peters v. McKay & Co. (Cal.)*, p. 173, vol. 26 (3 R R R).

Negligence of fellow servant obeying negligent order of vice principal.

*Galveston, H. & S. A. Ry. Co. v. Sherwood (Tex.)*, p. 564, vol. 27 (4 R R R).

Negligent inspector of trolley car and conductor.

*Shugard v. Union Traction Co. (Pa.)*, p. 826, vol. 24 (1 R R R).

Presumption as to law of sister state relating to fellow-servant rule.

*Baltimore & O. S. W. Ry. Co. v. Read (Ind.)*, p. 406, vol. 24 (1 R R R).

Section foreman engaged with section crew in operating hand car a vice principal.

*Haworth v. Kansas City Southern Ry. Co. (Mo.)*, p. 235, vol. 26 (3 R R R).

Section foreman while transporting men on hand cars to a place where they are to work does not act as a vice principal in giving an order to stop.

*Thacker v. Chicago, I. & L. Ry. Co. (Ind.)*, p. 772, vol. 27 (4 R R R).

States may fix by legislative enactment liabilities of employers for the acts and negligence of their employees.

*Southern Pac. Co. v. Schoer (C. C. A.)*, p. 254, vol. 26 (3 R R R).

Sufficiency of declaration in action for injury to section hand on hand car in charge of foreman.

*Thacker v. Chicago, I. & L. Ry. Co. (Ind.)*, p. 772, vol. 27 (4 R R R).

Sufficiency of petition in action for injury to section hand from fall from hand car in charge of foreman.

*Thacker v. Chicago, I. & L. Ry. Co. (Ind.)*, p. 772, vol. 27 (4 R R R).

Train master and road master superintending work of removing wreck responsible for negligence in fastening derrick chain, and not the fellow servants of injured employee.

*Reed v. Missouri, K. & T. Ry. Co. (Mo.)*, p. 262, vol. 26 (3 R R R).

Trainmen and telegraph operators are not.

*Illinois Cent. R. Co. v. Bentz (Tenn.)*, p. 191, vol. 28 (5 R R R).

Under laws of Virginia employee charged with duty of maintaining safe railroad bed a vice principal.

*Louisville & N. R. Co. v. Pointer (Ky.)*, p. 181, vol. 28 (5 R R R).

**FENCES.**

*See Cattle Guards.*

*Children.*

*Stock, Injuries to.*

Admissibility of evidence that track was fenced to within thirty or forty feet of switch where company claimed that fence so near switch would interfere with the switching of trains.

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- (Tex.), p. 866, vol. 26 (3 R R R).
- Cattle guards, sufficiency of.  
*Sappington v. Chicago & A. Ry. Co. (Mo.)*, p. 862, vol. 26 (3 R R R).
- Contract providing that private crossing over railroad shall be left open not against public policy.  
*Gulf, etc., Ry. Co. v. Clay (Tex.)*, p. 28, vol. 25 (2 R R R).
- Contributory negligence of plaintiff in using pasture after knowledge of construction of fence without openings, in action for loss of stock drowned through failure to leave openings in railroad fence.  
*Gulf, etc., Ry. Co. v. Clay (Tex.)*, p. 28, vol. 25 (2 R R R).
- Distance it was necessary to leave tracks unfenced in town, question for jury.  
*Downey v. Mississippi River & B. T. Ry. Co. (Mo.)*, p. 616, vol. 26 (3 R R R).
- Drowning of stock through failure to leave openings in railroad fence.  
*Gulf, etc., Ry. Co. v. Clay (Tex.)*, p. 28, vol. 25 (2 R R R).
- Duty of railroad company to fence tracks.  
*International & G. N. R. Co. v. Richmond (Tex.)*, p. 910, vol. 25 (2 R R R).
- Duty to fence tracks within town.  
*Downey v. Mississippi River & B. T. Ry. Co. (Mo.)*, p. 616, vol. 26 (3 R R R).
- Failure to fence could not be held to be proximate cause where injury to licensee was result of his being pushed on track by cow.  
*Schreiner v. Great Northern Ry. Co. (Minn.)*, p. 243, vol. 27 (4 R R R).
- Implied notice of defects.  
*Sappington v. Chicago & A. Ry. Co. (Mo.)*, p. 862, vol. 26 (3 R R R).
- Liability for injuries to boy received in crossing tracks, after passing through freight yard, as affected by failure to fence between tracks and freight yard, or between yard and street, under Massachusetts

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- statute requiring railroad companies to fence roads to prevent entrance of cattle.  
*Byrnes v. Boston & M. R. R. (Mass.)*, p. 600, vol. 26 (3 R R R).
- Liability for injury to boy on track as affected by failure to fence.  
*Fezler v. Willmar & S. F. Ry. Co. (Minn.)*, p. 174, vol. 24 (1 R R R).
- Liability of railroad company for leaving fence open for convenience of adjacent owner.  
*International & G. N. R. Co. v. Richmond (Tex.)*, p. 910, vol. 25 (2 R R R).
- Liability where stock were drowned in unprecedented flood through failure to leave openings in railroad fence.  
*Gulf, etc., Ry. Co. v. Clay (Tex.)*, p. 28, vol. 25 (2 R R R).
- Opening in fence for convenience of adjacent owner, as bearing upon liability of company for injury to stock escaping through such opening.  
*International & G. N. R. Co. v. Richmond (Tex.)*, p. 910, vol. 25 (2 R R R).
- Statements of plaintiff's foreman that he supposed he might have cut fence as bearing on question of contributory negligence, in action for loss of stock through failure to leave openings in railroad fence.  
*Gulf, etc., Ry. Co. v. Clay (Tex.)*, p. 28, vol. 25 (2 R R R).
- Sufficiency of evidence that openings were necessary, in action for loss of stock drowned through failure to leave openings in railroad fence.  
*Gulf, etc., Ry. Co. v. Clay (Tex.)*, p. 28, vol. 25 (2 R R R).
- Sufficiency of evidence to support verdict in action for loss of stock drowned through failure to leave openings in railroad fence.  
*Gulf, etc., Ry. Co. v. Clay (Tex.)*, p. 28, vol. 25 (2 R R R).
- Validity of oral contract to fence track as affected by statute of frauds.  
*Evans v. Southern Ry. Co. (Ala.)*, p. 859, vol. 26 (3 R R R).



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*Stations and Depots.*

Absolute liability imposed for fire set by locomotive; validity of Missouri statute.

McFarland *v.* Missouri, K. & T. Ry. Co. (Mo.), p. 656, vol. 25 (2 R R R).

Admissibility of evidence of negligence in permitting large masses of combustibles to be on right of way, and in negligently placing a car of powder near such material, under the pleading.

Crissey & Fowler Lumber Co. *v.* Denver & R. G. R. Co. (Colo.), p. 412, vol. 25 (2 R R R).

Assignability of contracts to maintain side tracks for convenience of sawmill owner in consideration of release of damages to stock and from fire.

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Burden of proving absence of negligence as affected by plea of confession and avoidance, in action for damages from fire set by locomotive.

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Burden of proving that engine was provided with proper spark arrester.

Illinois Cent. R. Co. *v.* Barrett (Ky.), p. 566, vol. 25 (2 R R R).

Burden of proving that locomotive was not defective where it has been shown that fire originated from it.

Great Northern Ry. Co. *v.* Coats (C. C. A.), p. 50, vol. 28 (5 R R R).

Care required of railroad to prevent fires.

Abrams *v.* Seattle & M. Ry. Co. (Wash.), p. 465, vol. 25 (2 R R R).

Circumstantial evidence of origin of fires.

Burlington & M. R. R. Co. in Nebraska *v.* Burch (Colo.), p. 21, vol. 27 (4 R R R).

Contract to maintain side tracks for convenience of sawmill owner in consideration of release of damages for injuries to stock and from fire not against public policy.

Missouri, K. & T. Ry. Co. of Texas *v.* Carter (Tex.), p. 538, vol. 26 (3 R R R).

**Contributory Negligence.**

Building house close to railroad.

St. Louis & S. W. Ry. Co. of Texas *v.* Miller (Tex.), p. 874, vol. 24 (1 R R R).

Evidence as to whether there was an accumulation of grass, etc., near pile of posts was inadmissible as the only contributory negligence alleged was that of piling posts on right of way.

St. Louis Southwestern Ry. Co. of Texas *v.* McAdams (Tex.), p. 19, vol. 27 (4 R R R).

Failure of workmen not in plaintiff's general employ to extinguish fire.

San Antonio & A. P. Ry. Co. *v.* Adams (Tex.), p. 878, vol. 24 (1 R R R).

Storing hay in barn adjoining right of way.

Texas & P. Ry. Co. *v.* Ruth-erford (Tex.), p. 334, vol. 26 (3 R R R).

**Damages.**

Harmless error in instruction, in action for destruction of grass.

Krejci *v.* Chicago & N. W. Ry. Co. (Iowa), p. 924, vol. 26 (3 R R R).

Market value of apples produced by trees destroyed by fire as element of damages.

Krejci *v.* Chicago & N. W. Ry. Co. (Iowa), p. 924, vol. 26 (3 R R R).

Measure of damages where grass land or meadow was injured by fire.

Krejci *v.* Chicago & N. W. Ry. Co. (Iowa), p. 924, vol. 26 (3 R R R).

Necessity of proving value of trees destroyed, under allegations of petition.

Krejci *v.* Chicago & N. W. Ry. Co. (Iowa), p. 924, vol. 26 (3 R R R).

Sufficiency of allegation to per-

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- mit introduction of evidence of value of farm before and after orchard was destroyed. *Krejci v. Chicago & N. W. Ry. Co. (Iowa)*, p. 924, vol. 26 (3 R R R).
- Defective construction of bridge must be proximate cause in action for frightening horses. *Kelsey v. New York, N. H. & H. R. Co. (Mass.)*, p. 880, vol. 24 (1 R R R).
- Degree of care required in furnishing and maintaining spark arresters. *Missouri, K. & T. Ry. Co. of Texas v. Carter (Tex.)*, p. 538, vol. 26 (3 R R R).
- Duty of railway company as to preventive machinery. *Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co. (C. C. A.)*, p. 445, vol. 25 (2 R R R).
- Evidence as to condition of spark arrester. *St. Louis & S. W. Ry. Co. of Texas v. Miller (Tex.)*, p. 874, vol. 24 (1 R R R).
- Evidence as to other fires. *Abrams v. Seattle & M. Ry. Co. (Wash.)*, p. 465, vol. 25 (2 R R R).
- Evidence, harmless error in admitting as to whether spark arrester had been punched. *Louisville & N. R. Co. v. Marbury Lumber Co. (Ala.)*, p. 68, vol. 28 (5 R R R).
- Evidence, harmless error in permitting engineer, on cross-examination, to be asked if his train was not running faster to make up time. *Louisville & N. R. Co. v. Marbury Lumber Co. (Ala.)*, p. 68, vol. 28 (5 R R R).
- Evidence of condition of other engines in action for damage by fire set by locomotive. *Missouri, K. & T. Ry. Co. of Texas v. Carter (Tex.)*, p. 538, vol. 26 (3 R R R).
- Evidence of examination of engine which it was claimed passed by where fire originated, a few minutes before it was discovered. *Crissey & Fowler Lumber Co. v. Denver & R. G. R. Co. (Colo.)*, p. 412, vol. 25 (2 R R R).

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- Evidence of habit of punching spark arresters where engine was identified. *Lesser Cotton Co. v. St. Louis I. M. & S. Ry. Co. (C. C. A.)*, p. 445, vol. 25 (2 R R R).
- Evidence of origin. *Gulf, C. & S. F. Ry. Co. v. Johnson (Tex.)*, p. 831, vol. 24 (1 R R R).
- Evidence of other fires. *Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co. (C. C. A.)*, p. 445, vol. 25 (2 R R R). *Texas & P. Ry. Co. v. Rutherford (Tex.)*, p. 334, vol. 26 (3 R R R).
- Fuel, erroneous instruction as to duty of railroad company. *Raleigh Hosiery Co. v. Raleigh & G. R. Co. (N. Car.)*, p. 702, vol. 28 (5 R R R).
- Harmless error in admission of evidence as to origin. *Gulf, C. & S. F. Ry. Co. v. Burroughs (Tex.)*, p. 829, vol. 24 (1 R R R).
- Harmless error in instruction as to duty in regard to appliances. *St. Louis & S. W. Ry. Co. of Texas v. Miller (Tex.)*, p. 874, vol. 24 (1 R R R).
- Inadequate fire apparatus, question for jury. *L. A. Marande v. Texas & Pac. Ry. Co. (U. S.)*, p. 728, vol. 24 (1 R R R).
- Inadequate watchmen, question for jury. *L. A. Marande v. Texas & Pac. Ry. Co. (U. S.)*, p. 728, vol. 24 (1 R R R).
- Instruction as to negligence not warranted by pleading. *Gulf, C. & S. F. Ry. Co. v. Johnson (Tex.)*, p. 831, vol. 24 (1 R R R).
- Insurable interest where building was constructed on right of way by permission. *Greenwich Ins. Co. v. Louisville & N. R. Co. (Ky.)*, p. 605, vol. 24 (1 R R R).
- It could not be held as a matter of law that locomotive was properly operated. *Great Northern Ry. Co. v. Coats (C. C. A.)*, p. 50, vol. 28 (5 R R R).

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It was not error to refuse evidence of fires ignited by other engines where the engine in question had been identified.

*Crissey & Fowler Lumber Co. v. Denver & R. G. R. Co.* (Colo.), p. 412, vol. 25 (2 R R R).

It was not error to refuse to instruct that greater care was required to protect against fires in presence of inflammable materials in dry and windy weather.

*Lesser Cotton Co. v. St. Louis I. M. & S. Ry. Co.* (C. C. A.), p. 445, vol. 25 (2 R R R).

Joinder of property owner and insurance company.

*St. Louis & S. W. Ry. Co. of Texas v. Miller* (Tex.), p. 874, vol. 24 (1 R R R).

Liability as affected by use of due care in selecting employees.

*St. Louis & S. W. Ry. Co. of Texas v. Miller* (Tex.), p. 874, vol. 24 (1 R R R).

Liability for spreading of fires lighted on right of way.

*Grant v. Omaha, etc., R. Co.* (Mo.), p. 953, vol. 26 (3 R R R).

Liability of domestic proprietor where foreign corporation is permitted to use the road.

*McFarland v. Missouri, K. & T. Ry. Co.* (Mo.), p. 656, vol. 25 (2 R R R).

Liability of lessee under Gen. St., § 1511 of South Carolina.

*Bush v. Southern Ry. Co.* (S. Car.), p. 458, vol. 25 (2 R R R).

Liability of receivers on account of fire set prior to receivership.

*Grant v. Omaha, etc., Ry. Co.* (Mo.), p. 953, vol. 26 (3 R R R).

Liability under statute where road jointly operated.

*McFarland v. Missouri, K. & T. Ry. Co.* (Mo.), p. 656, vol. 25 (2 R R R).

Negligence of company in allowing combustibles to accumulate on right of way.

*Livermon v. Roanoke & T. R. Co.* (N. Car.), p. 506, vol. 28 (5 R R R).

On issue whether fire was set by sparks from locomotive, the

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evidence being circumstantial, testimony that it was dry weather was admissible.

*Louisville & N. R. Co. v. Marbury Lumber Co.* (Ala.), p. 68, vol. 28 (5 R R R).

Opinion evidence as to existence of defect in arrester based on size of sparks emitted.

*Louisville & N. R. Co. v. Marbury Lumber Co.* (Ala.), p. 68, vol. 28 (5 R R R).

Ordinary wind not a new and independent agency.

*Chicago & E. R. Co. v. Lesh* (Ind.), p. 20, vol. 27 (4 R R R).

Origin of fire, question for jury.

*L. A. Marande v. Texas & Pac. Ry. Co.* (U. S.), p. 728, vol. 24 (1 R R R).

Presumption as to ownership of engine on lease road.

*Bush v. Southern Ry. Co.* (S. Car.), p. 458, vol. 25 (2 R R R).

Presumption of negligence.

*Krejci v. Chicago & N. W. Ry. Co.* (Iowa), p. 924, vol. 26 (3 R R R).

Presumption of negligence from fact that fire was communicated by locomotive.

*Raleigh Hosiery Co. v. Raleigh & G. R. Co.* (N. Car.), p. 702, vol. 28 (5 R R R).

Prima facie case.

*Louisville & N. R. Co. v. Marbury Lumber Co.* (Ala.), p. 68, vol. 28 (5 R R R).

Prima facie case made out by proof that fire was set by sparks from locomotive.

*Louisville & N. R. Co. v. Marbury Lumber Co.* (Ala.), p. 68, vol. 28 (5 R R R).

Question for jury whether prima facie case was overcome.

*Great Northern Ry. Co. v. Coats* (C. C. A.), p. 50, vol. 28 (5 R R R).

Questions of defendant's negligence was for the jury where plaintiff had established a prima facie case and defendant showed that engine was carefully managed and equipped.

*Preece v. Rio Grande W. Ry. Co.* (Utah), p. 460, vol. 25 (2 R R R).

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- Rebuttal of prima facie case.  
 Gulf, C. & S. F. Ry. Co. *v.* Johnson (Tex.), p. 831, vol. 24 (1 R R R).
- Requested instruction as to care required in furnishing spark arresters properly refused as argumentative.  
 Missouri, K. & T. Ry. Co. of Texas *v.* Carter (Tex.), p. 538, vol. 26 (3 R R R).
- Right of insurance company to recover against railroad where building constructed on right of way by permission is destroyed by fire.  
 Greenwich Ins. Co. *v.* Louisville & N. R. Co. (Ky.), p. 605, vol. 24 (1 R R R).
- Right to allege both statutory and common-law liability for fires set by locomotives.  
 Crissey & Fowler Lumber Co. *v.* Denver & R. G. R. Co. (Colo.), p. 412, vol. 25 (2 R R R).
- Single cause of action stated by joint petition in action by owner of property destroyed by fire and insurance company, which paid loss.  
 St. Louis & S. W. Ry. Co. of Texas *v.* Miller (Tex.), p. 874, vol. 24 (1 R R R).
- Subrogation of insurer.  
 Crissey & Fowler Lumber Co. *v.* Denver & R. G. R. Co. (Colo.), p. 412, vol. 25 (2 R R R).
- Sufficiency of circumstantial evidence as to origin of fire.  
 Crissey & Fowler Lumber Co. *v.* Denver & R. G. R. Co. (Colo.), p. 412, vol. 25 (2 R R R).
- Sufficiency of evidence as to origin of fire.  
 San Antonio & A. P. Ry. Co. *v.* Adams (Tex.), p. 878, vol. 24 (1 R R R).
- Preece *v.* Rio Grande W. Ry. Co. (Utah), p. 460, vol. 25 (2 R R R).
- Sufficiency of evidence of negligence.  
 Armstrong *v.* Wilmington & W. R. Co. (N. Car.), p. 706, vol. 27 (4 R R R).
- Sufficiency of evidence of negligence in action for fire claimed to have been set by locomotive.  
 Southern Ry. Co. *v.* Pace (Ga.), p. 604, vol. 24 (1 R R R).

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- Sufficiency of evidence of negligence in managing engine.  
 Texas & P. Ry. Co. *v.* Rutherford (Tex.), p. 334, vol. 26 (3 R R R).
- Sufficiency of evidence that combustibles were allowed to accumulate and remain on right of way.  
 Texas & P. Ry. Co. *v.* Rutherford (Tex.), p. 334, vol. 26 (3 R R R).
- Sufficiency of evidence that inflammable material on right of way was ignited by passing engine.  
 Abrams *v.* Seattle & M. Ry. Co. (Wash.), p. 465, vol. 25 (2 R R R).
- Sufficiency of rebutting testimony to overcome prima facie case.  
 San Antonio & A. P. Ry. Co. *v.* Adams (Tex.), p. 878, vol. 24 (1 R R R).
- Sufficiency of testimony to rebut prima facie case against railroad.  
 St. Louis & S. W. Ry. Co. of Texas *v.* Miller (Tex.), p. 874, vol. 24 (1 R R R).
- Velocity of wind, instruction.  
 Great Northern Ry. Co. *v.* Coats (C. C. A.), p. 50, vol. 28 (5 R R R).
- Where counts contained some material additional facts and were not obnoxious to the rule prohibiting additional counts containing merely facts already declared on, it was error to require plaintiff to elect on which count he would proceed.  
 Crissey & Fowler Lumber Co. *v.* Denver & R. G. R. Co. (Colo.), p. 412, vol. 25 (2 R R R).

**FIXTURES.**

*See Right of Way.*

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*See Crossings.*  
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**FOREIGN CARS.**

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 Liability of company transferring car for defect causing injury to employee of other company.  
*Missouri, K. & T. Ry. Co. v. Merrill* (Kan.), p. 209, vol. 28 (5 R R R).

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*See Connecting Carriers. Process.*

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*Removal of Cause.*  
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*Southern Ry. Co. v. Mayes* (C. C. A.), p. 663, vol. 24 (1 R R R).  
 Removal of cause on ground of diverse citizenship.  
*Arkansas v. Kansas & Texas Coal Co.* (U. S.), p. 337, vol. 24 (1 R R R).

**FOREIGN JUDGMENTS.**

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**FOREIGN LAWS.**

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 Expert testimony to prove construction placed on foreign statute.  
*Mexican Nat. R. Co. v. Slater* (C. C. A.), p. 712, vol. 27 (4 R R R).

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*Tickets and Fares.*  
 Invalidity of reorganization of railroads, fraudulent as against creditors.  
*Wenger v. Chicago & E. R. Co.* (C. C. A.), p. 707, vol. 25 (5 R R R).

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**FREIGHT.**

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**FREIGHT DEPOTS.**

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**FREIGHT TRAINS.**

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**FREIGHT YARDS.**

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**FRIGHT.**

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**FRIGHTENING HORSES.**

*See Instructions.*  
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**FRIGHTENING TEAMS.**

*See Contributory Negligence.*  
*Crossings.*  
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*Kentucky & I. Bridge Co.'s Receivers v. Montgomery* (Ky.), p. 405, vol. 25 (2 R R R).

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Care required of person using highway part of toll bridge upon which trains are operated.  
*Kentucky & I. Bridge Co.'s Receivers v. Montgomery* (Ky.), p. 405, vol. 25 (2 R R R).  
 Definition.  
*Kentucky & I. Bridge Co.'s Receivers v. Montgomery* (Ky.), p. 405, vol. 25 (2 R R R).



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- Duty of driver of shy team to avoid street upon which there is an electric railway.  
*Doran v. Cedar Rapids & M. C. Ry. Co. (Iowa)*, p. 929, vol. 26 (3 R R R).
- Failure to stop, look and listen before driving under bridge undergoing repairs.  
*Yazoo & M. V. R. Co. v. Eakin (Miss.)*, p. 895, vol. 24 (1 R R R).
- Sufficiency of evidence.  
*Texas Midland R. R. v. Cardwell (Tex.)*, p. 892, vol. 24 (1 R R R).
- Sufficiency of evidence of negligence where horse was frightened at crossing.  
*Texas Midland R. R. v. Cardwell (Tex.)*, p. 892, vol. 24 (1 R R R).
- Sufficiency of evidence where horse was frightened by unusual noises from engine at crossing.  
*Texas & P. Ry. Co. v. Hamilton (Tex.)*, p. 884, vol. 24 (1 R R R).
- Sufficiency of instruction.  
*Texas & P. Ry. Co. v. Hamilton (Tex.)*, p. 884, vol. 24 (1 R R R).
- Unaccountable fright and shying of gentle horse.  
*Gulf, C. & S. F. Ry. Co. v. Sandifer (Tex.)*, p. 387, vol. 27 (4 R R R).
- Customary noises.  
*Louisville & N. R. Co. v. Penrod's Adm'r (Ky.)*, p. 887, vol. 24 (1 R R R).
- Customary signals.  
*Texas & P. Ry. Co. v. Hamilton (Tex.)*, p. 884, vol. 24 (1 R R R).
- Declaration of engineer as *res gestæ* in action for frightening horses.  
*Gulf, C. & S. F. Ry. Co. v. Milner (Tex.)*, p. 607, vol. 24 (1 R R R).
- Duty of motorman to exercise care to discover plaintiff's peril.  
*Doran v. Cedar Rapids & M. C. Ry. Co. (Iowa)*, p. 929, vol. 26 (3 R R R).
- Duty of trainmen to keep a look out when operating train on

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- one side of company's bridge.  
*Kentucky & I. Bridge Co.'s Receivers v. Montgomery (Ky.)*, p. 405, vol. 25 (2 R R R).
- Frightened horse injured by reason of fall into ditch not injured by the running of the locomotive which frightened it.  
*Lowe v. Alabama & V. Ry. Co. (Miss.)*, p. 335, vol. 27 (4 R R R).
- Insufficiency of evidence to show wilfulness or wantonness where horse frightened by locomotive was injured by fall into ditch.  
*Lowe v. Alabama & V. Ry. Co. (Miss.)*, p. 335, vol. 27 (4 R R R).
- Liability, erroneous instruction.  
*Oates v. Metropolitan St. Ry. Co. (Mo.)*, p. 916, vol. 26 (3 R R R).
- Liability for frightening horses by giving statutory crossing signals.  
*Gulf, C. & S. F. Ry. Co. v. Milner (Tex.)*, p. 607, vol. 24 (1 R R R).
- Liability for injury resulting from malicious conduct of employee.  
*Texas & P. Ry. Co. v. Hamilton (Tex.)*, p. 884, vol. 24 (1 R R R).
- Liability of company where horse of ordinary gentleness was frightened by mail crane.  
*Cleghorn v. Western Ry. of Alabama (Ala.)*, p. 501, vol. 28 (5 R R R).
- Negligence of motorman in violently ringing bell could not be justified as being to assist driver of runaway horse in preventing it from going on the track.  
*Oates v. Metropolitan St. Ry. Co. (Mo.)*, p. 916, vol. 26 (3 R R R).
- Negligence of trainmen after discovering plaintiff's peril where his horse was frightened on toll bridge.  
*Kentucky & I. Bridge Co.'s Receivers v. Montgomery (Ky.)*, p. 405, vol. 25 (2 R R R).
- Proximate cause where gentle horse became unaccountably

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frightened and shied over unguarded approach to bridge.

Gulf, C. & S. F. Ry. Co. v. Sandifer (Tex.), p. 387, vol. 27 (4 R R R).

Question whether mortorman used ordinary care in management of his car when horse in front of it became frightened was for the jury.

Oates v. Metropolitan St. Ry. Co. (Mo.), p. 916, vol. 26 (3 R R R).

Sufficiency of evidence of negligence in giving signals in action for injury to plaintiff caused by frightening mule.

Texas & P. Ry. Co. v. Hamilton (Tex.), p. 884, vol. 24 (1 R R R).

Sufficiency of evidence of negligence in sounding whistle under bridge.

Kelsey v. New York, N. H. & H. R. Co. (Mass.), p. 880, vol. 24 (1 R R R).

Team frightened at crossing by reason of hand car which was an unsightly object.

International & G. N. R. Co. v. Locke (Tex.), p. 754, vol. 25 (2 R R R).

Unnecessarily allowing engine emitting steam to remain at crossing.

Texas Midland R. R. v. Cardwell (Tex.), p. 892, vol. 24 (1 R R R).

Usual and necessary noises in starting train at crossing.

Lake Shore & M. S. Ry. Co. v. Butts (Ind.), p. 898, vol. 24 (1 R R R).

**FUEL.**

*See Fires.*

**FUTURE DAMAGES.**

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**GAMING.**

Liability of railroad company for suffering gaming on moving train under Ky. St., sec. 1978.

Louisville & N. R. Co. v. Com. (Ky.), p. 567, vol. 25 (2 R R R).

**GATES.**

*See Crossings.*  
*Stock, Injuries to.*

**GENERAL VERDIOT.**

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**GOVERNMENTAL CONTROL.**

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**GOVERNMENTAL POWERS.**

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*See Public Lands.*

**GRADE CROSSINGS.**

*See Crossings.*

**GRANTS.**

*See Public Lands.*  
*Railroad Aid Grants.*  
*Right of Way.*

Construction of hotel and eating house on land a use of it for railroad purposes.

Abraham v. Oregon & C. R. Co. (Ore.), p. 111, vol. 28 (5 R R R).

Land granted for eating house for public accommodation of passengers and others granted for a public purpose.

Abraham v. Oregon & C. R. Co. (Ore.), p. 111, vol. 28 (5 R R R).

The fact that there is another eating house or hotel near by, ample to accommodate passengers and employees, does not render the use of land for an eating house repugnant to grant for public purposes.

Abraham v. Oregon & C. R. Co. (Ore.), p. 111, vol. 28 (5 R R R).

**GROSS NEGLIGENCE.**

*See Carriers of Passengers.*  
*Crossings.*  
*Damages.*  
*Negligence.*  
*Pleading.*  
*Trespassers.*

**GROUND.**

*See Right of Way.*

**GUARDS.**

*See Public Lands.*

**HACKMEN.**

*See Carriers of Passengers.*

Hack driver properly joined as defendant in action against railway company for injury to hack passenger.

Chicago, R. I. & P. Ry. Co. *v.* Durand (Kan.), p. 519, vol. 26 (3 R R R).

**HACKS.**

*See Interstate Commerce.*

**HAND CARS.**

*See Fellow Servants.*  
*Master and Servant.*

**HEARSAY EVIDENCE.**

*See Evidence.*

**HOMESTEAD.**

*See Public Lands.*  
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**HORSES.**

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**HOSPITAL FEES.**

*See Personal Injuries.*

**HOSPITALS.**

*See Master and Servant.*

**HUMILIATION.**

*See Carriers of Passengers.*

**HUSBAND AND WIFE.**

*See Death by Wrongful Act.*  
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**IOE.**

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**IMPAIRMENT OF CONTRACT OBLIGATIONS.**

*See Bonds.*  
*Street Railways.*

**IMPROVEMENTS.**

*See Eminent Domain.*  
*Local Assessments.*

**IMPUTABLE NEGLIGENCE.**

*See Children.*

Negligence of servant in failing, while driving his master in vehicle, to avoid danger from fallen trolley wire imputable to latter.

Read *v.* City & Suburban Ry. Co. (Ga.), p. 278, vol. 26 (3 R R R).

**IMPUTED NEGLIGENCE.**

*See Crossings.*

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*See Railroads.*

**INDEBTEDNESS.**

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**INDIOTMENTS.**

*See Railroads.*  
*Railroads in Streets.*  
*Streets and Highways.*

Improper use of street under municipal grant may constitute a public nuisance, and is subject to indictment.

Town of Mason *v.* Ohio River R. Co. (W. Va.), p. 899, vol. 25 (2 R R R).

**INFANTS.**

*See Children.*

**INJUNCTIONS.**

*See Contractors.*  
*Eminent Domain.*  
*Nuisances.*  
*Railroad Commissions.*  
*Railroads in Streets.*  
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Right of citizen whose interest in public park differs only in degree from that of other residents of city, to enjoin condemnation of it for railroad station.

Manson *v.* South Bound R. Co. (S. Car.), p. 338, vol. 28 (5 R R R).

**INJURIES TO EMPLOYEES.**

*See Master and Servant.*

**INJURIES TO PROPERTY.**

*See Water and Watercourses.*

Determining whether verdict was excessive in action for injury to property from operation of coal bins.

Louisville & N. R. Co. *v.* Walton (Ky.), p. 570, vol. 26 (3 R R R).

Judgment in action against railroad for injuries from negligent construction and operation of stock pens not a bar to subsequent action for permanent depreciation in value resulting from their prudent construction and operation.

Bramlette *v.* Louisville & N. R. Co. (Ky.), p. 441, vol. 26 (3 R R R).

**INJURIES TO PROPERTY—INSOLVENCY—Continued.***Continued.*

Liability for injury to adjacent property from explosion of contents of car during delay in delivery.

*Ft. Worth & D. C. Ry. Co. v. Beauchamp* (Tex.), p. 52, vol. 26 (3 R R R).

Liability of railroad for injury to adjacent property from prudent operation of stock pens required by law.

*Bramlette v. Louisville & N. R. Co.* (Ky.), p. 441, vol. 26 (3 R R R).

Negligence in failing to deliver car loads of explosives, question for jury in action for injury to property from their explosion.

*Ft. Worth & D. C. Ry. Co. v. Beauchamp* (Tex.), p. 52, vol. 26 (3 R R R).

Property owner not estopped from recovering damages for injuries to his property from operation of coal bins.

*Louisville & N. R. Co. v. Walton* (Ky.), p. 570, vol. 26 (3 R R R).

Recovery of damages from injuries to property from operation of coal bins necessary to operation of railroad.

*Louisville & N. R. Co. v. Walton* (Ky.), p. 570, vol. 26 (3 R R R).

**INJURY TO FEELINGS.**

*See Carriers of Passengers.*

**INSANITY.**

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**INSOLVENCY.**

*See Estoppel.*

*Railroads.*

*Receivers.*

Application of proceeds of foreclosure sale, construction of decree.

*Bank of Commerce v. Central Coal & Coke Co.* (C. C. A.), p. 605, vol. 27 (4 R R R).

Judgments may be obtained against railroad in hands of receiver.

*Fidelity Ins., Trust & Safe Deposit Co. v. Norfolk & W. R. Co.* (N. Car.), p. 598, vol. 27 (4 R R R).

Judgments obtained against company during receivership

for tort committed prior to receivership not entitled to priority over claims of mortgage bondholders from earnings of receivership.

*Fidelity Ins., Trust & Safe Deposit Co. v. Norfolk & W. R. Co.* (N. Car.), p. 598, vol. 27 (4 R R R).

Preferential claims where mortgage is foreclosed.

*Niles Tool Works Co. v. Louisville, N. A. & C. Ry. Co.* (C. C. A.), p. 936, vol. 24 (1 R R R).

Preferential debts, supplies furnished during receivership.

*Central Trust Co. v. Richmond & D. R. Co.* (C. C. A.), p. 577, vol. 27 (4 R R R).

*Southern Ry. Co. v. Ensign Mfg. Co.* (C. C. A.), p. 577, vol. 27 (4 R R R).

Priority as between receiver's certificates where foreclosure of mortgage.

*Bank of Commerce v. Central Coal & Coke Co.* (C. C. A.), p. 605, vol. 27 (4 R R R).

Trust funds where distribution of assets in insolvency.

*Central R. & Bkg. Co. of Georgia v. Farmers' Loan & Trust Co.* (Ga.), p. 615, vol. 27 (4 R R R).

*Farmers' Loan & Trust Co. v. Central R. & Bkg. Co. of Georgia* (Ga.), p. 615, vol. 27 (4 R R R).

**INSPECTION.**

*See Carriers of Passengers.*

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**INSTRUCTIONS.**

*See Construction.*

*Crossings.*

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Care required of motorman at crossing to avoid injuries to travelers.

*Louisville Ry. Co. v. Will* (Ky.), p. 826, vol. 25 (2 R R R).

Covered by other instructions.

*Louisville & N. R. Co. v. Harmon* (Ky.), p. 76, vol. 24 (1 R R R).

**INSTRUCTIONS—Continued.**

Error in instructions, when presumably prejudicial.

*Camp v. Wabash R. Co. (Mo.)*, p. 746, vol. 25 (2 R R R).

Error to direct attention of jury to fact not proven by testimony or reasonable inference.

*Camp v. Wabash R. Co. (Mo.)*, p. 746, vol. 25 (2 R R R).

Harmless error.

*Conness v. Indiana, I. & I. R. Co. (Ill.)*, p. 260, vol. 24 (1 R R R).

Improper to instruct jury in action for personal injuries for negligence to assess damages at what they may think plaintiff has sustained.

*Camp v. Wabash R. Co. (Mo.)*, p. 746, vol. 25 (2 R R R).

In an action against a railroad company, it is not a charge on facts to say "I feel confident that you will not be influenced by the fact that the railroad is a rich corporation."

*Davis v. Atlanta & C. A. L. Ry. Co. (S. Car.)*, p. 317, vol. 26 (3 R R R).

Instructions as to failure to look and listen.

*Guinney v. Southern Electric R. Co. (Mo.)*, p. 820, vol. 25 (2 R R R).

Instructions as to liability for loss of goods where they were in a state of decay on initial line.

*Missouri, K. & T. Ry. Co. v. Mazzie (Tex.)*, p. 950, vol. 25 (2 R R R).

Instructions based upon facts not pleaded as contributory negligence properly refused.

*International & G. N. R. Co. v. Locke (Tex.)*, p. 754, vol. 25 (2 R R R).

Instructions founded on facts not supported by evidence are erroneous.

*Camp v. Wabash R. Co. (Mo.)*, p. 746, vol. 25 (2 R R R).

Instruction that if defendant was guilty of negligence "charged in the declaration," and such negligence was the proximate cause of the plaintiff's injuries, he should recover, if in the exercise of ordinary care, was not objectionable as referring jury to

**INSTRUCTIONS—Continued.**

declarations to determine material issues.

*Illinois Cent. R. Co. v. Jernigan (Ill.)*, p. 535, vol. 28 (5 R R R).

Negligence as proximate cause.

*Edwards v. Southern Ry. Co. (S. Car.)*, p. 761, vol. 25 (2 R R R).

Not based on evidence.

*Doolittle v. Southern Ry. Co. (S. Car.)*, p. 105, vol. 24 (1 R R R).

Sufficiency of instruction in action for death by collision where the charge construed as a whole covers questions of negligence and contributory negligence.

*Olson v. Oregon Short Line R. Co. (Utah)*, p. 797, vol. 25 (2 R R R).

When a failure on the part of the court to confine the jury by instructions to acts of negligence alleged is not prejudicial, in action for death by wrongful act.

*Louisville Ry. Co. v. Will (Ky.)*, p. 826, vol. 25 (2 R R R).

When instruction as to damages not objectionable as authorizing jury to fix compensation regardless of testimony.

*Guyer v. Davenport, R. I. & N. W. Ry. Co. (Ill.)*, p. 667, vol. 25 (2 R R R).

When instruction as to failure to give signals is properly refused.

*Edwards v. Southern Ry. Co. (S. Car.)*, p. 761, vol. 25 (2 R R R).

When instruction as to master's duty to use care for servant, though erroneous, does not constitute reversible error.

*Dolan v. Sierra Ry. Co. of California (Cal.)*, p. 875, vol. 25 (2 R R R).

When instruction as to offsets of benefits against damages, erroneous.

*Guyer v. Davenport, R. I. & N. W. Ry. Co. (Ill.)*, p. 667, vol. 25 (2 R R R).

When instruction erroneous as unduly emphasizing a particular defense.

*Lumsden v. Chicago, etc., Ry. Co. (Tex.)*, p. 806, vol. 25 (2 R R R).



**INSTRUCTIONS—Continued.**

When instructions in action for injuries received by negligence not erroneous as assuming defendant's negligence.

*International & G. N. R. Co. v. Locke* (Tex.), p. 754, vol. 25 (2 R R R).

When instructions not objectionable as exonerating motor-man from all negligence.

*Guinney v. Southern Electric R. Co.* (Mo.), p. 820, vol. 25 (2 R R R).

When instruction that certain facts constituted contributory negligence was properly modified, leaving question for jury.

*Edwards v. Southern Ry. Co.* (S. Car.), p. 761, vol. 25 (2 R R R).

When instruction that plaintiff was guilty of contributory negligence in not taking a different route is objectionable as being argumentative.

*Lumsden v. Chicago, etc., Ry. Co.* (Tex.), p. 806, vol. 25 (2 R R R).

When instruction that there is no rule of law relieving a person from looking out for train is properly given.

*Edwards v. Southern Ry. Co.* (S. Car.), p. 761, vol. 25 (2 R R R).

When proper to refuse instruction as to ringing of bells and sounding whistles, when same is regulated by statute.

*Suburban R. Co. v. Balkwill* (Ill.), p. 784, vol. 25 (2 R R R).

**INSULTS.**

*See Carriers of Passengers.*

**INSURANCE.**

*See Accident Insurance.*  
*Death by Wrongful Act.*  
*Fires.*  
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**INTELLIGENCE.**

*See Children.*

**INTENTIONAL INJURIES.**

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**INTEREST.**

*See Bonds.*  
*Damages.*  
*Eminent Domain.*

**INTERSECTIONS.**

*See Railroads.*

**INTERSTATE COMMERCE.**

*See Licenses.*  
*Police Powers.*  
*Taxation.*

Act of Congress of March 2, 1893, relative to couplings on cars used by carriers in interstate commerce need not be pleaded in order to avail plaintiff.

*Voelker v. Chicago, M. & St. P. Ry. Co.* (Iowa), p. 509, vol. 27 (4 R R R).

Act of Congress of March 2, 1893, requiring cars used in interstate commerce to be equipped with automatic couplers applicable to car designed for interstate commerce though at the time being hauled empty.

*Voelker v. Chicago, M. & St. P. Ry. Co.* (Iowa), p. 509, vol. 27 (4 R R R).

Act of March 2, 1893, does not make it unlawful for common carriers to use locomotives engaged in interstate commerce which are not equipped with automatic couplers.

*Johnson v. Southern Pac. Co.* (C. C. A.), p. 11, vol. 28 (5 R R R).

Any interference by enforcement of state law prohibiting greater charge for short than long haul, too remote to be unconstitutional.

*Louisville & N. R. Co. v. Commonwealth of Kentucky* (U. S.), p. 118, vol. 24 (1 R R R).

Cab business not exempt from taxation under New York statute exempting from taxation on corporate franchises property employed in interstate commerce, although the company was also engaged in interstate commerce.

*People v. Knight* (N. Y.), p. 636, vol. 27 (4 R R R).

Cars loaded with articles shipped to other states and started, whether in yards, on tracks, or in trains, are used to move interstate traffic.

*Johnson v. Southern Pac. Co.* (C. C. A.), p. 11, vol. 28 (5 R R R).

Construction of state statute giving different effect to similar language in interstate com-

**INTERSTATE COMMERCE—**  
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merce law binding on United States supreme court.  
*Louisville & N. R. Co. v. Commonwealth of Kentucky* (U. S.), p. 118, vol. 24 (1 R R R).  
 Effect under Interstate Commerce Act securing continuous passage, uniform rates, equal facilities, etc., of limiting liability where goods are carried over points within state, when stipulation concerns only points within state.

*Hughes v. Pa. R. Co. (Pa.)*, p. 925, vol. 25 (2 R R R).

Equipment of car with one kind of couplers sufficient, under Act of Congress of March 2, 1893.

*Johnson v. Southern Pac. Co. (C. C. A.)*, p. 11, vol. 28 (5 R R R).

Fact that grain was received at initial point from carrier by which it was transported from point in another state, and was there stored for further shipment did not make shipment an interstate one, where it was not taken under through bill of lading.

*United States ex rel. Kellogg v. Lehigh Val. R. Co. (N. Y.)*, p. 682, vol. 26 (3 R R R).

Initial carrier was not guilty of unlawful discrimination, in violation of interstate commerce act, by placing cattle in suitable pens instead of delivering them to connecting carrier.

*Central Stock Yards Co. v. Louisville & N. R. Co. (C. C. A.)*, p. 259, vol. 28 (5 R R R).

Kentucky Constitution, § 218, which prohibited carriers from charging more for short haul than long haul, as an interference with interstate commerce.  
*Louisville & N. R. Co. v. Eubank (U. S.)*, p. 610, vol. 24 (1 R R R).

Mandamus where discrimination in furnishing cars for transportation of interstate traffic.  
*United States v. Norfolk & W. Ry. Co. (W. Va.)*, p. 19, vol. 26 (3 R R R).

Second action, in mandamus proceedings against railroad for unjust discrimination in

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furnishing cars for shipment of coal, where parties and subject-matter involved in the two proceedings are the same.  
*United States v. Norfolk & W. Ry. Co. (W. Va.)*, p. 71, vol. 26 (3 R R R).

Shipment between same points in state not an interstate shipment because line of road between terminal points passes through other states.

*United States ex rel. Kellogg v. Lehigh Val. R. Co. (N. Y.)*, p. 682, vol. 26 (3 R R R).

South Carolina statute providing penalty for failure to pay damages on freight within sixty days not unconstitutional as in violation of interstate commerce clause of constitution.

*Porter v. Charleston & S. Ry. Co. (S. Car.)*, p. 657, vol. 26 (3 R R R).

State statute effected by Interstate Commerce Act, where carrier is penalized for shipping goods from a foreign state by route other than that designated by the shipper.

*Lowe v. Seaboard Air Line Ry. Co. (S. Car.)*, p. 934, vol. 25 (2 R R R).

Statute requiring whistle to be sounded before crossing is reached, as an interference with interstate commerce.

*Bonham v. Citizens' St. R. Co. (Ind.)*, p. 787, vol. 25 (2 R R R).

Unjust discrimination in distributing cars among coal shippers.

*United States v. Norfolk & W. Ry. Co. (W. Va.)*, p. 19, vol. 26 (3 R R R).

When car is used in moving interstate traffic.

*Johnson v. Southern Pac. Co. (C. C. A.)*, p. 11, vol. 28 (5 R R R).

**INTERURBAN RAILWAY.**

*See Eminent Domain.*

**INTERVENING AGENCY.**

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**INTERVENTION.**

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**INTOXICATION.**

*See Accidents on Tracks.  
Carriers of Passengers.  
Contributory Negligence.*

**JERKS AND JARS.**

*See Carriers of Passengers.*

**JOINER OF ACTIONS.**

*See Carriers of Freight.*

**JOINT TORT FEASORS.**

*See Torts.*

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In the absence of knowledge of defects, a servant does not assume the risk of injuries from defects.

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- Negligence of guard on express car causing injury to express messenger. *Wells, Fargo & Co. v. Page* (Tex.), p. 568, vol. 27 (4 R R R).
- Negligence of superior servant. *Cincinnati, etc., Ry. Co. v. Cook* (Ky.), p. 321, vol. 25 (2 R R R).
- Obstructions near track. *Gulf, C. & S. F. Ry. Co. v. Darby* (Tex.), p. 327, vol. 25 (2 R R R).
- Obvious dangers. *Ladd v. Brockton St. Ry. Co. (Mass.)*, p. 342, vol. 24 (1 R R R).
- Lindsay v. New York, N. H. & H. R. Co. (C. C. A.)*, p. 378, vol. 24 (1 R R R).
- Obvious dangers, question of law. *Lindsay v. New York, N. H. & H. R. Co. (C. C. A.)*, p. 378, vol. 24 (1 R R R).
- Of cars being moved without warning while brakeman was between cars repairing couplings. *Bowes v. New York, N. H. & H. R. Co. (Mass.)*, p. 292, vol. 25 (2 R R R).
- Overcrowded hand car. *Haworth v. Kansas City Southern Ry. Co. (Mo.)*, p. 235, vol. 26 (3 R R R).
- Overexertion in turning car on turntable, by conductor. *Roberts v. Indianapolis St. Ry. Co. (Ind.)*, p. 957, vol. 27 (4 R R R).
- Plaintiff's own testimony that he was aware of existence of defect. *Smalls v. Southern Ry. Co. (Ga.)*, p. 166, vol. 26 (3 R R R).
- Pleading. *Tucker v. Northern Pac. Terminal Co. (Ore.)*, p. 66, vol. 27 (4 R R R).
- Position of side ladder under employers' liability act of Vermont. *Kilpatrick v. Grand Trunk Ry. Co. (Vt.)*, p. 945, vol. 27 (4 R R R).
- Proximity of water spout to roof of passing car, in action for death of brakeman. *Choctaw, O. & G. R. Co. v. McDade* (C. C. A.), p. 413, vol. 24 (1 R R R).
- Riding on defective hand car. *Weldon v. Omaha, K. C. & E. Ry. Co. (Mo.)*, p. 244, vol. 26 (3 R R R).
- Risk assumed by bridge builder. *Daniels v. Covington & C. El. R. & Transfer & Bridge Co. (Ky.)*, p. 595, vol. 27 (4 R R R).
- Risk from failure to repair roadbed not assumed. *Smith v. Erie R. Co. (N. J.)*, p. 793, vol. 27 (4 R R R).
- Risk of negligence of fellow servant not assumed under Iowa employers' liability act. *Pearl v. Omaha & St. L. R. Co. (Iowa)*, p. 598, vol. 24 (1 R R R).
- Speed in violation of ordinance. *Martin v. Chicago, R. I. & P. R. Co. (Iowa)*, p. 397, vol. 24 (1 R R R).
- Sufficiency of evidence of employees' knowledge of defect in machinery. *Gulf, C. & S. F. Ry. Co. v. Haden* (Tex.), p. 285, vol. 26 (3 R R R).

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Sufficiency of evidence where brakeman was injured by defective draw heads and link pins.

Rio Grande & E. P. Ry. Co. v. Lynch (Tex.), p. 419, vol. 24 (1 R R R).

Switchman injured by reason of obstructions in switch yard.

Kansas City S. Ry. Co. v. Billinglea (C. C. A.), p. 167, vol. 28 (5 R R R).

That directions and warnings were given by engineer, and not conductor, did not affect the question of assumption of risk by brakeman uncoupling moving cars.

Gorman v. Minneapolis & St. L. Ry. Co. (Iowa), p. 293, vol. 26 (3 R R R).

The fact that business of clearing away wreck is inherently dangerous could not affect the right of recovery of employee injured by reason of negligence in fastening derrick chain.

Reed v. Missouri, K. & T. Ry. Co. (Mo.), p. 262, vol. 26 (3 R R R).

Unballasted switch track, by brakeman.

Arkansas Cent. R. Co. v. Jackson (Ark.), p. 790, vol. 27 (4 R R R).

Unloading logs.

Boyer v. Eastern Ry. Co. of Minnesota (Minn.), p. 457, vol. 28 (5 R R R).

Using defective engine step, sufficiency of evidence.

Kerrigan v. Chicago, M. & St. P. Ry. Co. (Minn.), p. 531, vol. 27 (4 R R R).

Voluntarily going to work at different place from that assigned.

Green v. Brainerd & N. M. Ry. Co. (Minu.), p. 87, vol. 27 (4 R R R).

Working under tender as affected by inexperience.

Galveston, H. & S. A. Ry. Co. v. Hitzfelder (Tex.), p. 357, vol. 24 (1 R R R).

Yard overcrowded with cars.

Bence v. New York, N. H. & H. R. R. (Mass.), p. 295, vol. 26 (3 R R R).

Care required by master in fur-

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nishing appliances.

Peplinski v. Pennsylvania R. Co. (Pa.), p. 526, vol. 27 (4 R R R).

Care required of master in furnishing appliances.

Budge v. Morgan's L. & T. R. & S. S. Co. (La.), p. 440, vol. 27 (4 R R R).

Collisions and accidents may be reasonably anticipated as the probable consequence of absence of brakes.

Choctaw, O. & G. R. Co. v. Holloway (C. C. A.), p. 75, vol. 27 (4 R R R).

Company leasing its road, as authorized by charter, liable to employee of lessee injured through lessee's negligence.

Brown v. Atlanta & C. Air Line Ry. Co. (N. Car.), p. 621, vol. 28 (5 R R R).

Company leasing its road to another company is liable to a servant of lessee for injuries caused by lessee's negligence in operation of road.

Smith v. Atlanta & C. R. Co. (S. Car.), p. 659, vol. 28 (5 R R R).

Competency of section man to testify as to speed of train.

Haworth v. Kansas City Southern Ry. Co. (Mo.), p. 235, vol. 26 (3 R R R).

Contract with father hiring out services of son releasing claim for future injuries valid and binding to extent of exempting master from liability for negligent acts which are not criminal.

New v. Southern Ry. Co. (Ga.), p. 101, vol. 28 (5 R R R).

Contributory Negligence.

Application of rule requiring brakeman to know that conductor is on train before starting it.

Pearl v. Omaha & St. L. R. Co. (Iowa), p. 598, vol. 24 (1 R R R).

Attempting to carry heavy log.

Galveston, H. & S. A. Ry. Co. v. Sherwood (Tex.), p. 564, vol. 27 (4 R R R).

Brakeman on roof of car struck by water spout.

Choctaw, O. & G. R. Co. v. McDade (C. C. A.), p. 413, vol. 24 (1 R R R).

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Care required of employee for self-protection.

Louisville & N. R. Co. *v.* Shumaker (Ky.), p. 513, vol. 27 (4 R R R).

Choosing dangerous method of work.

Kilpatrick *v.* Grand Trunk Ry. Co. (Vt.), p. 945, vol. 27 (4 R R R).

Contributory negligence and assumption of risk no defense where collision and injury to servant was caused by absence of brakes.

Choctaw, O. & G. R. Co. *v.* Holloway (C. C. A.), p. 75, vol. 27 (4 R R R).

Contributory negligence and negligence in using dangerous instrumentality after discovery of plaintiff's peril.

St. Louis S. W. Ry. Co. *v.* Jacobson (Tex.), p. 301, vol. 25 (2 R R R).

Contributory negligence, as matter of law, not shown by evidence in action for death of conductor killed in derailment.

International & G. N. Ry. Co. *v.* Vinson (Tex.), p. 372, vol. 26 (3 R R R).

Contributory negligence in adjusting coupling after discovery of plaintiff's peril.

Ft. Worth & R. G. Ry. Co. *v.* Bowen (Tex.), p. 315, vol. 25 (2 R R R).

Contributory negligence of brakeman going up side of car did not necessarily prevent him from recovering for injuries caused by proximity of switch to track.

Morrisette *v.* Canadian Pac. Ry. Co. (Vt.), p. 219, vol. 28 (5 R R R).

Contributory negligence of bridge builder whose hands were crushed by end of tie he was handling.

Daniels *v.* Covington & C. El. R. & Transfer & Bridge Co. (Ky.), p. 595, vol. 27 (4 R R R).

Coupling foreign cars with mismatched coupling was not.

Southern Pac. Co. *v.* Winton (Tex.), p. 358, vol. 26 (3 R R R).

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Defense cut off by continuing negligence.

Elmore *v.* Seaboard Air Line Ry. Co. (N. Car.), p. 566, vol. 27 (4 R R R).

Directing verdict in action for injury to brakeman caused by loose wheel.

O'Brien *v.* New York, N. H. & H. R. Co. (Mass.), p. 346, vol. 24 (1 R R R).

Disobeying rules.

Green *v.* Brainerd & N. M. Ry. Co. (Minn.), p. 87, vol. 27 (4 R R R).

Duty to keep down damages.

Illinois Cent. R. Co. *v.* Gheen (Ky.), p. 402, vol. 24 (1 R R R).

Employee's violation of rule of employer not negligence per se.

Missouri, K. & T. Ry. Co. of Texas *v.* Pawkett (Tex.), p. 185, vol. 26 (3 R R R).

Employee walking on track without seeing train after jumping from moving switch engine.

Jean *v.* Boston & M. R. R. (Mass.), p. 234, vol. 26 (3 R R R).

Engineer not bound, for his self-protection, to keep lookout for defects in track.

Gulf, etc., Ry. Co. *v.* Moore (Tex.), p. 620, vol. 26 (3 R R R).

Erroneous conduct induced by fear.

St. Louis S. W. Ry. Co. *v.* Jacobson (Tex.), p. 301, vol. 25 (2 R R R).

Erroneous conduct in trying to avoid danger.

Reed *v.* Missouri, K. & T. Ry. Co. (Mo.), p. 262, vol. 26 (3 R R R).

Evidence justified finding that conductor injured in collision at switch was not negligent in remaining in caboose for purpose of adjusting switch.

Missouri, K. & T. Ry. Co. of Texas *v.* Pawkett (Tex.), p. 185, vol. 26 (3 R R R).

Forgetfulness.

Kilpatrick *v.* Grand Trunk Ry. Co. (Vt.), p. 945, vol. 27 (4 R R R).

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Instruction declaring that the voluntary jumping off hand car was contributory negligence.

*Perez v. San Antonio & A. P. Ry. Co. (Tex.)*, p. 354, vol. 25 (2 R R R).

Instruction not objectionable as requiring that contributory negligence be proximate cause of injury.

*Missouri, K. & T. Ry. Co. of Texas v. Johnson (Tex.)*, p. 178, vol. 26 (3 R R R).

Instruction properly modified by adding (in substance) "unless accident was caused by defect in appliance."

*Bowers v. Star Logging & Lumber Co. (Ore.)*, p. 300, vol. 26 (3 R R R).

Instructions.

*Chicago & A. Ry. Co. v. Eaton (Ill.)*, p. 353, vol. 24 (1 R R R).

Insufficiency of evidence to show contributory negligence where car repairer at work under car was injured by reason of collision between such car and engine in charge of inexperienced "hostler."

*Chicago Terminal Transfer R. Co. v. Stone (C. C. A.)*, p. 243, vol. 28 (5 R R R).

Insufficiency of evidence where employee riding on front platform of street car was injured by reason of proximity of trolley poles and absence of platform.

*Citizens' St. R. Co. v. Reed (Ind.)*, p. 43, vol. 27 (4 R R R).

Issue as to whether employee knew of defect in appliance and assumed risk could only be raised by special plea.

*International & G. N. R. Co. v. Harris (Tex.)*, p. 317, vol. 25 (2 R R R).

Knowledge of rules, sufficiency of evidence.

*Springs v. Southern Ry. Co. (N. Car.)*, p. 274, vol. 26 (3 R R R).

Making coupling not a placing of cars in train within meaning of rule forbidding employees to place cars with

defective couplings in train.  
*Southern Pac. Co. v. Winton (Tex.)*, p. 358, vol. 26 (3 R R R).

Must be pleaded.

*Perez v. San Antonio & A. P. Ry. Co. (Tex.)*, p. 354, vol. 25 (2 R R R).

Negligence in loading logging train.

*Williams v. Northern Lumber Co. (Minn.)*, p. 283, vol. 25 (2 R R R).

Nonsuit.

*Roberts v. Albany & N. Ry. Co. (Ga.)*, p. 349, vol. 24 (1 R R R).

No recovery for injury to employee where proximate cause was disobedience to rule.

*Green v. Brainerd & N. M. Ry. Co. (Minn.)*, p. 87, vol. 27 (4 R R R).

Of employee injured at night by roof of oil-house projecting over track, question for jury.

*Gulf, C. & S. F. Ry. Co. v. Darby (Tex.)*, p. 327, vol. 25 (2 R R R).

Of employee sent out to learn duties of conductor of street car.

*Ladd v. Brockton St. Ry. Co. (Mass.)*, p. 342, vol. 24 (1 R R R).

Of gatemen in standing between tracks.

*Tirrell v. New York, etc., R. Co. (Mass.)*, p. 344, vol. 24 (1 R R R).

Of injured conductor in failing to see that brakeman went ahead to signal to see whether train could enter switch.

*Missouri, K. & T. Ry. Co. of Texas v. Pawkett (Tex.)*, p. 185, vol. 26 (3 R R R).

Presumption of care on part of employee killed while working under engine.

*Morbey v. Chicago N. W. Ry. Co. (Iowa)*, p. 371, vol. 24 (1 R R R).

Question for jury.

*Galveston, H. & S. A. Ry. Co. v. Quay (Tex.)*, p. 349, vol. 24 (1 R R R).

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Question for jury in action for death of brakeman caused by derailment.

Chicago & A. Ry. Co. *v.* Eaton (Ill.), p. 353, vol. 24 (1 R R R).

Question for jury where brakeman was injured by reason of his foot slipping between ties of defective track.

Erie R. Co. *v.* Moore (C. C. A.), p. 44, vol. 25 (2 R R R).

Question for jury whether danger was so imminent as to require discontinuance of work where promise to repair.

Thacker *v.* Chicago, I. & L. Ry. Co. (Ind.), p. 772, vol. 27 (4 R R R).

Question for jury whether employees in charge of engine could not have avoided injuring car inspector notwithstanding his contributory negligence.

Louisville & N. R. Co. *v.* Lowe (Ky.), p. 363, vol. 24 (1 R R R).

Question for jury whether injured employee observed rule requiring him to have his train under full control when entering yard.

Southern Ry. Co. *v.* Craig (C. C. A.), p. 310, vol. 25 (2 R R R).

Requested instruction properly refused where evidence did not show that conductor killed in derailment could have checked speed of train sufficiently.

International & G. N. Ry. Co. *v.* Vinson (Tex.), p. 372, vol. 26 (3 R R R).

Right of brakeman to rely on compliance with rule requiring flags and torpedoes.

Chicago & A. Ry. Co. *v.* Eaton (Ill.), p. 353, vol. 24 (1 R R R).

Right of defendant to special charge in action for injury to employee.

Gulf, C. & S. F. Ry. Co. *v.* Mangham (Tex.), p. 193, vol. 26 (3 R R R).

Right to assume that master has performed his duty with

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respect to duty of furnishing safe place to work and suitable appliances.

Smith *v.* Erie R. Co. (N. J.), p. 793, vol. 27 (4 R R R).

Right to continue work relying on promise to repair.

Taylor *v.* Nevada-California-Oregon Ry. Co. (Nev.), p. 781, vol. 27 (4 R R R).

Right to rely on master's judgment in using wooden fulcrum in repairing engine.

Louisville & N. R. Co. *v.* Richardson (Ky.), p. 360, vol. 24 (1 R R R).

Sufficiency of evidence of freedom from contributory negligence in action for injury to brakeman sustained while between cars repairing coupling.

Bowes *v.* New York, N. H. & H. R. Co. (Mass.), p. 292, vol. 25 (2 R R R).

Switchman mounting moving train in yard.

Kansas City S. Ry. Co. *v.* Billingslea (C. C. A.), p. 167, vol. 28 (5 R R R).

Trainman injured by reason of protruding bolt on top of car, of which he had no knowledge, was not guilty of contributory negligence.

International & G. N. R. Co. *v.* Bayne (Tex.), p. 370, vol. 25 (2 R R R).

Undertaking performance of dangerous work.

Cogdell *v.* Southern Ry. Co. (N. Car.), p. 39, vol. 27 (4 R R R).

Using defective engine step, sufficiency of evidence.

Kerrigan *v.* Chicago, M. & St. P. Ry. Co. (Minn.), p. 531, vol. 27 (4 R R R).

Using "speeder" on track without looking out for trains.

Cleveland, A. & C. Ry. Co. *v.* Workman (Ohio), p. 551, vol. 27 (4 R R R).

Where a conductor is injured in a collision occurring from delay in his train in taking side track, an expert cannot testify as to precautions he should have taken under the rules for his protection,



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over objection that the rules were the best evidence.

Missouri, K. & T. Ry. Co. of Texas v. Pawkett (Tex.), p. 185, vol. 26 (3 R. R. R.).

Court may instruct that Act of Congress of March 2, 1893, relating to couplings on cars of carriers engaged in interstate commerce is applicable although it is not alleged that the car was used in interstate commerce. Voelker v. Chicago, M. & St. P. Ry. Co. (Iowa), p. 509, vol. 27 (4 R. R. R.).

Custom as to manner of coupling cars immaterial where absence of automatic couplers. Voelker v. Chicago, M. & St. P. Ry. Co. (Iowa), p. 509, vol. 27 (4 R. R. R.).

**Damages.**

Damages recoverable under statute imposing penalty for failure to pay wages.

St. Louis, I. M. & S. Ry. Co. v. Pickett (Ark.), p. 569, vol. 27 (4 R. R. R.).

Evidence that plaintiff was indebted to third party who threatened to report the indebtedness to the company was inadmissible.

Missouri, K. & T. Ry. Co. of Texas v. Bailey (Tex.), p. 518, vol. 27 (4 R. R. R.).

Excessive verdict for death of conductor.

Southern Ry. Co. v. Craig (C. C. A.), p. 310, vol. 25 (2 R. R. R.).

Excessive verdict for injury to engineer.

St. Louis S. W. Ry. Co. v. Kelton (Tex.), p. 279, vol. 25 (2 R. R. R.).

Measure of damages for personal injuries to servant.

Galveston, etc., Ry. Co. v. Abbey (Tex.), p. 50, vol. 27 (4 R. R. R.).

Measure of damages for refusal to give certificate of admission to hospital maintained by contributions of employees.

Illinois Cent. R. Co. v. Gheen (Ky.), p. 402, vol. 24 (1 R. R. R.).

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Mental and physical suffering in action for breach of contract to furnish railroad employee medical and hospital attention.

Galveston, H. & S. A. Ry. Co. v. Rubio (Tex.), p. 375, vol. 24 (1 R. R. R.).

Remote damages for injuries to sick employee resulting from refusal to transport home, where breach of contract to furnish medical attention.

Galveston, H. & S. A. Ry. Co. v. Rubio (Tex.), p. 375, vol. 24 (1 R. R. R.).

\$16,000 not excessive where engineer thirty-five years old sustained loss of foot. Galveston, etc., R. Co. v. Abbey (Tex.), p. 50, vol. 27 (4 R. R. R.).

Defective trestles, proximate cause of injury.

Dolan v. Sierra Ry. Co. of California (Cal.), p. 875, vol. 25 (2 R. R. R.).

Degree of care required of master for servant's protection.

Choctaw, O. & G. R. Co. v. Holloway (C. C. A.), p. 75, vol. 27 (4 R. R. R.).

Demand by assignee of claim for wages not a compliance with Indiana statute providing for monthly payment of wages in absence of written contract. Chicago & S. E. Ry. Co. v. Glover (Ind.), p. 376, vol. 26 (3 R. R. R.).

Direction of verdict for defendant not warranted in action for death of brakeman caused by mismatched couplings. Southern Pac. Co. v. Winton (Tex.), p. 358, vol. 26 (3 R. R. R.).

**Duties and Liabilities of Master to Servant.**

Absence of evidence of negligence of fireman, in action for injury to brakeman coupling cars.

Zahn v. Milwaukee & S. Ry. Co. (Wis.), p. 268, vol. 26 (3 R. R. R.).

Act of God excusing performance of duty to servant.

Southern Pac. Co. v. Schoer (C. C. A.), p. 254, vol. 26 (3 R. R. R.).

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Admissibility of evidence of reconstruction of appliances in action for death of employee.

Choctaw, O. & G. R. Co. *v.* McDade (C. C. A.), p. 413, vol. 24 (1 R R R).

Admissibility of evidence that plaintiff complained of use of road engine and was promised a safer engine, in action by brakeman for injuries alleged to have been caused by being compelled to ride on pilot of road engine, instead of switch engine.

Springs *v.* Southern Ry. Co. (N. Car.), p. 274, vol. 26 (3 R R R).

After discovering deceased's peril, in action for injury to employee working under engine.

Morbey *v.* Chicago N. W. Ry. Co. (Iowa), p. 371, vol. 24 (1 R R R).

Burden of proving nonexistence of written contract under Indiana statute providing for monthly payment of wages in absence of written contract.

Chicago & S. E. Ry. Co. *v.* Glover (Ind.), p. 376, vol. 26 (3 R R R).

Care due employee crossing track at public crossing when off duty.

Davis *v.* Atlanta & C. A. L. Ry. Co. (S. Car.), p. 317, vol. 26 (3 R R R).

Care due employee rightfully on track.

St. Louis S. W. Ry. Co. *v.* Jacobson (Tex.), p. 301, vol. 25 (2 R R R).

Care due from railroad company to one acting as express messenger and also, with its knowledge and approval, as its baggageman.

Missouri, K. & T. Ry. Co. of Texas *v.* Reasor (Tex.), p. 281, vol. 26 (3 R R R).

Care required in furnishing appliances.

Louisville & N. R. Co. *v.* Richardson (Ky.), p. 360, vol. 24 (1 R R R).

Care required of employee on engine after discovering

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peril of employee working under another engine.

Morbey *v.* Chicago N. W. Ry. Co. (Iowa), p. 371, vol. 24 (1 R R R).

Care required to avoid collisions between trains.

Southern Ry. Co. *v.* Craig (C. C. A.), p. 310, vol. 25 (2 R R R).

Care required to avoid collisions between trains as affected by rule of company regulating movements of trains.

Southern Ry. Co. *v.* Craig (C. C. A.), p. 310, vol. 25 (2 R R R).

Complaint alleged that employee "who was in charge and control and superintendence of defendant's engine" negligently moved it, injuring plaintiff, alleged charge of engine, and was not demurrable as indefinite, or as attempting to join two causes of action, under Ala. Code, sec. 1749, subdiv. 2, giving an employee an action for damages for injury from negligence of employee having superintendence intrusted to him, and subdivision giving such action for negligence of employee having control of an engine.

Birmingham Southern R. Co. *v.* Cuzzart (Ala.), p. 312, vol. 26 (3 R R R).

Defect in machinery, sufficiency of allegation where machine is in possession of defendant.

Gulf, C. & S. F. Ry. Co. *v.* Haden (Tex.), p. 285, vol. 26 (3 R R R).

Degree of care in furnishing safe machinery.

Gustafson *v.* Seattle Traction Co. (Wash.), p. 176, vol. 26 (3 R R R).

Degree of care, instruction.

Dolan *v.* Sierra Ry. Co. of California (Cal.), p. 875, vol. 25 (2 R R R).

Degree of care required in inspecting cars and appliances.

Southern Pac. Co. *v.* Winton (Tex.), p. 358, vol. 26 (3 R R R).

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Degree of care required of railroad company in employing engineers.

Southern Pac. Co. *v.* Huntsman (C. C. A.), p. 203, vol. 28 (5 R R R).

Duty to employee with respect to roadbed.

Smith *v.* Erie R. Co. (N. J.), p. 793, vol. 27 (4 R R R).

Duty to furnish and inspect appliances a nonassignable one.

Atchison, T. & S. F. Ry. Co. *v.* Kingscott (Kan.), p. 528, vol. 27 (4 R R R).

Budge *v.* Morgan's L. & T. R. & S. S. Co. (La.), p. 440, vol. 27 (4 R R R).

Duty to furnish food, shelter and transportation to employee working away from home.

King *v.* Interstate Consol. St. Ry. Co. (R. I.), p. 520, vol. 27 (4 R R R).

Morrison *v.* Interstate Consol. St. Ry. Co. (R. I.), p. 520, vol. 27 (4 R R R).

Duty to furnish safe place to work and appliances a nonassignable one.

Smith *v.* Erie R. Co. (N. J.), p. 793, vol. 27 (4 R R R).

Duty to furnish safe place to work, degree of care.

Southern Indiana Ry. Co. *v.* Moore (Ind.), p. 251, vol. 26 (3 R R R).

Duty to furnish safe track, nonassignable.

Chicago & A. Ry. Co. *v.* Eaton (Ill.), p. 353, vol. 24 (1 R R R).

Duty to furnish suitable machinery, instruction.

Dolan *v.* Sierra Ry. Co. of California (Cal.), p. 875, vol. 25 (2 R R R).

Duty to give signals to warn car inspector of approach of engine.

Louisville & N. R. Co. *v.* Lowe (Ky.), p. 363, vol. 24 (1 R R R).

Duty to inspect appliances.

Budge *v.* Morgan's L. & T. R. & S. S. Co. (La.), p. 440, vol. 27 (4 R R R).

Duty to inspect cars.

Texas & P. Ry. Co. *v.* Allen (C. C. A.), p. 37, vol. 27 (4 R R R).

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Duty to inspect foreign cars.

Budge *v.* Morgan's L. & T. R. & S. S. Co. (La.), p. 440, vol. 27 (4 R R R).

Duty to keep lookout to prevent injuring car inspector working in woodyard.

Louisville & N. R. Co. *v.* Lowe (Ky.), p. 363, vol. 24 (1 R R R).

Duty to light excavation by reason of which employee, in going at night to his engine, was injured.

Missouri, K. & T. Ry. Co. of Texas *v.* Johnson (Tex.), p. 178, vol. 26 (3 R R R).

Duty to warn and instruct servant.

Proffitt *v.* Missouri, K. & T. Ry. Co. of Texas (Tex.), p. 196, vol. 28 (5 R R R).

Evidence of condition of car after accident, in action for injury to employee riding on defective hand car.

Weldon *v.* Omaha, K. C. & E. Ry. Co. (Mo.), p. 244, vol. 26 (3 R R R).

Evidence of custom to stop detached portions of train, in action for death of brakeman.

Pearl *v.* Omaha & St. L. R. Co. (Iowa), p. 598, vol. 24 (1 R R R).

Evidence of prior possibilities of similar accidents from same cause, in action for injuries sustained by employee while attempting to set brake on logging train.

Bowers *v.* Star Logging & Lumber Co. (Ore.), p. 300, vol. 26 (3 R R R).

Evidence of rule requiring conductors to take precautions to avoid injuring employees, in action for death of brakeman caused by failure of conductor to stop detached portions of train while car is being set out.

Pearl *v.* Omaha & St. L. R. Co. (Iowa), p. 598, vol. 24 (1 R R R).

Failure of foreman to give signal to stop at proper place, sufficiency of evidence in action for injury to section man riding on hand car.

Haworth *v.* Kansas City Southern Ry. Co. (Mo.), p. 235, vol. 26 (3 R R R).

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Failure to equip cars with brake beams hung high enough to pass over a brakeman lying on the ground was not negligence.

Texas Cent. R. Co. *v.* Waller (Tex.), p. 84, vol. 27 (4 R R R).

Fall and injury of trainmen caused by protruding bolt on top of car.

International & G. N. R. Co. *v.* Bayne (Tex.), p. 370, vol. 25 (2 R R R).

Ignorant of condition of brakemen responsible for accident did not relieve defendant from liability for its failure to have track in safe condition.

St. Louis S. W. Ry. Co. *v.* Kelton (Tex.), p. 279, vol. 25 (2 R R R).

Indiana statute providing for monthly payment of wages in absence of written contract must be strictly construed.

Chicago & S. E. Ry. Co. *v.* Glover (Ind.), p. 376, vol. 26 (3 R R R).

Injury to section man running hand car at dangerous rate of speed, sufficiency of evidence.

Haworth *v.* Kansas City Southern Ry. Co. (Mo.), p. 235, vol. 26 (3 R R R).

Inspection of appliances.

Atchison, T. & S. F. Ry. Co. *v.* Kingscott (Kan.), p. 528, vol. 27 (4 R R R).

Inspection of machinery, sufficiency of evidence of due care.

Gulf, C. & S. F. Ry. Co. *v.* Haden (Tex.), p. 285, vol. 26 (3 R R R).

Instruction as to care due employee on track after discovery of peril.

St. Louis S. W. Ry. Co. *v.* Jacobson (Tex.), p. 301, vol. 25 (2 R R R).

Instruction as to negligence erroneous for assuming that plaintiff was in a perilous position, in action for injury to servant caused by propelling locomotive against car in which he was riding.

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Texas *v.* Sibley (Tex.), p. 292, vol. 26 (3 R R R).

Liability for failure to inspect cars as affected by existence of rule requiring inspection. Southern Pac. Co. *v.* Winton (Tex.), p. 358, vol. 26 (3 R R R).

Liability for injury to employee waiting to be assigned work. Reed *v.* Missouri, K. & T. Ry. Co. (Mo.), p. 262, vol. 26 (3 R R R).

Liability for injury to hand caused by negligence of foreman in detaching brace from building with rope.

Missouri, K. & T. Ry. Co. of Texas *v.* Walden (Tex.), p. 294, vol. 25 (2 R R R).

Liability for injury to servant resulting from negligence in fastening derrick chain in removing wreck.

Reed *v.* Missouri, K. & T. Ry. Co. (Mo.), p. 262, vol. 26 (3 R R R).

Liability for negligence of employee in running against person standing near depot. Missouri, K. & T. Ry. Co. of Texas *v.* Edwards (Tex.), p. 430, vol. 25 (2 R R R).

Liability for negligence of employee running car for his private use causing injury to employee in a collision between hand car and other vehicle.

International & G. N. R. Co. *v.* Branch (Tex.), p. 230, vol. 26 (3 R R R).

Liability for negligence of trackmen in failing to inspect and repair tracks.

Smith *v.* Erie R. Co. (N. J.), p. 793, vol. 27 (4 R R R).

Liability for refusal to give certificate of admission to hospital maintained by contributions of employees.

Illinois Cent. R. Co. *v.* Gheen (Ky.), p. 402, vol. 24 (1 R R R).

Liability when ordinary care in construction and repair of trestles is used.

Dolan *v.* Sierra Ry. Co. of California (Cal.), p. 875, vol. 25 (2 R R R).

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Master liable for injury caused by concurring negligence of himself and third party.

Choctaw, O. & G. R. Co. v. Holloway (C. C. A.), p. 75, vol. 27 (4 R R R).

Master not liable for mere error in judgment in furnishing appliances.

O'Neill v. Chicago, R. I. & P. R. Co. (Neb.), p. 642, vol. 28 (5 R R R).

Measure of damages for refusal to give certificate of admissions to hospital maintained by contributions of employee.

Illinois Cent. R. Co. v. Gheen (Ky.), p. 402, vol. 24 (1 R R R).

Mental and physical suffering, in action for breach of contract to furnish railroad employee medical and hospital attention.

Galveston, H. & S. A. Ry. Co. v. Rubio (Tex.), p. 375, vol. 24 (1 R R R).

Negligence in detaching tender from engine where fireman was injured, while cleaning engine in roundhouse, by fall into pit.

Galveston, H. & S. A. Ry. Co. v. Quay (Tex.), p. 349, vol. 24 (1 R R R).

Negligence in failing to discover defect in automatic coupler.

Galveston, H. & S. A. Ry. Co. v. Sherwood (Tex.), p. 564, vol. 27 (4 R R R).

Negligence in failing to guard excavation, instruction.

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Negligence in failing to provide brakes.

Choctaw, O. & G. R. Co. v. Holloway (C. C. A.), p. 75, vol. 27 (4 R R R).

Negligence in leaving car too near switch, insufficiency of evidence in action for injury to employee sustained while climbing side of moving car, in yard.

Bence v. New York, N. H. & H. R. R. (Mass.), p. 295, vol. 26 (3 R R R).

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Negligence in maintaining water spout in proximity to roof of passing car.

Choctaw, O. & G. R. Co. v. McDade (C. C. A.), p. 413, vol. 24 (1 R R R).

Negligence in operating engine on switch track.

Jensen v. Omaha & St. L. R. Co. (Iowa), p. 46, vol. 27 (4 R R R).

Negligence in using wooden fulcrum in repairing engine.

Louisville & N. R. Co. v. Richardson (Ky.), p. 360, vol. 24 (1 R R R).

Negligence of engineer after discovery of decedent's peril, erroneous instruction.

Louisville & N. R. Co. v. Banks (Ala.), p. 359, vol. 25 (2 R R R).

Negligence of engineer in backing train while brakeman was coupling cars.

Cincinnati, etc., Ry. Co. v. Cook (Ky.), p. 321, vol. 25 (2 R R R).

Negligence of engineer was a question for the jury in action for death of employee killed on track.

Louisville & N. R. Co. v. Banks (Ala.), p. 359, vol. 25 (2 R R R).

Negligence of superior servant.

Cincinnati, etc., Ry. Co. v. Cook (Ky.), p. 321, vol. 25 (2 R R R).

Negligence per se of master where engineer and fireman ascending mountain are killed by descending train crashing into theirs.

Price v. Lehigh Val. R. Co. (Pa.), p. 319, vol. 25 (2 R R R).

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Negligence, pleading and proof where employee was injured on track.

Dickson v. St. Louis & K. R. Co. (Mo.), p. 515, vol. 25 (2 R R R).

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Negligence, question for jury in action for death of brakeman in a derailment.

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Negligence, question for jury, in action for injury to brakeman resulting from fall from top of car caused by breaking of running board.

Mexican Cent. Ry. Co., Limited, v. Townsend (C. C. A.), p. 306, vol. 26 (3 R R R).

Negligence, question for jury where brakeman was injured by reason of his foot slipping between ties in defective track.

Erie R. Co. v. Moore (C. C. A.), p. 44, vol. 25 (2 R R R).

Negligence, question for jury where employee working under engine was killed by reason of another engine being run against it.

Morbey v. Chicago N. W. Ry. Co. (Iowa), p. 371, vol. 24 (1 R R R).

No duty to warn experienced employee of danger of being struck by car in crowded yard.

Bence v. New York, N. H. & H. R. R. (Mass.), p. 295, vol. 26 (3 R R R).

Nonassignable duties, instruction.

Dolan v. Sierra Ry. Co. of California (Cal.), p. 875, vol. 25 (2 R R R).

Opinion of employees as to sufficiency of light at excavation by reason of which employee was injured.

Missouri, K. & T. Ry. Co. of Texas v. Johnson (Tex.), p. 178, vol. 26 (3 R R R).

Peremptory instruction that foreman was free from negligence in failing to give customary signal to stop hand car properly refused, in action for injury to section hand.

Haworth v. Kansas City Southern Ry. Co. (Mo.), p. 235, vol. 26 (3 R R R).

Proximate cause of injury to section hand removing wreck, where injury was

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inflicted by flying fragment of car, and derrick chain had been improperly fastened.

Reed v. Missouri, K. & T. Ry. Co. (Mo.), p. 262, vol. 26 (3 R R R).

Proximate cause of injury where trainman on top of car lost his balance by sudden movement of train and struck his foot against protruding bolt.

International & G. N. R. Co. v. Bayne (Tex.), p. 370, vol. 25 (2 R R R).

Question for jury whether derailment was caused by defective rail or obstruction merely.

Peters v. McKay & Co. (Cal.), p. 173, vol. 26 (3 R R R).

Question for jury whether employees in charge of engine could not have avoided injuring car inspector even if he was guilty of contributory negligence.

Louisville & N. R. Co. v. Lowe (Ky.), p. 363, vol. 24 (1 R R R).

Question for jury whether failure of foreman in charge of section crew to give customary signal to stop hand car was negligence.

Haworth v. Kansas City Southern Ry. Co. (Mo.), p. 235, vol. 26 (3 R R R).

Question for jury whether hand car was overcrowded in action for injury to section man.

Haworth v. Kansas City Southern Ry. Co. (Mo.), p. 235, vol. 26 (3 R R R).

Remote damages for injuries to sick employee resulting from refusal to transport home, where breach of contract to furnish medical attention.

Galveston, H. & S. A. Ry. Co. v. Rubio (Tex.), p. 375, vol. 24 (1 R R R).

Rules requiring flags and torpedoes as evidence of their necessity, in action for death of brakeman in a derailment.

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Scope of employment where brakeman, in leaving a saloon to board train, ran against person standing near depot and pushed him under car.

Missouri, K. & T. Ry. Co. of Texas *v.* Edwards (Tex.), p. 430, vol. 25 (2 R R R).

Sufficiency of complaint in action for injuries to employee exposed to extreme cold while employed to remove snow from defendant's track.

Carll *v.* Interstate Consol. St. Ry. Co. (R. I.), p. 308, vol. 25 (2 R R R).

Sufficiency of evidence of defect in rail where employee was injured by reason of derailment.

Peters *v.* McKay & Co. (Cal.), p. 173, vol. 26 (3 R R R).

Sufficiency of evidence of existence of custom to stop engine when brakeman is coupling cars.

Schus *v.* Powers-Simpson Co. (Minn.), p. 420, vol. 24 (1 R R R).

Sufficiency of evidence of negligence.

Central of Georgia Ry. Co. *v.* Austin (Ga.), p. 148, vol. 26 (3 R R R).

Sufficiency of evidence of negligence in construction of bridge.

Miller *v.* Great Northern Ry. Co. (Minn.), p. 371, vol. 26 (3 R R R).

Sufficiency of evidence that injury to employee was caused by failure to have sufficient hands to lower the gins of pile driver.

Gustafson *v.* Seattle Trac-tion Co. (Wash.), p. 176, vol. 26 (3 R R R).

Sufficiency of evidence that water spout was proximate cause of death of brakeman on roof of car.

Choctaw, O. & G. R. Co. *v.* McDade (C. C. A.), p. 413, vol. 24 (1 R R R).

Sufficiency of evidence to show negligence in conductor signaling engineer to move train without warning plain-

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tiff, in action for injury to brakeman between cars repairing coupling.

Bowes *v.* New York, N. H. & H. R. Co., (Mass.), p. 292, vol. 25 (2 R R R).

Sufficiency of evidence to show negligence in furnishing machinery.

Gulf, C. & S. F. Ry. Co. *v.* Haden (Tex.), p. 285, vol. 26 (3 R R R).

Sufficiency of evidence to show that brakeman would not have been killed had rule requiring flags and torpedoes been observed.

Chicago & A. Ry. Co. *v.* Eaton (Ill.), p. 353, vol. 24 (1 R R R).

Sufficiency of evidence to sustain finding that defendant was negligent for having failed to properly instruct and warn employee injured by reason of brake on logging train becoming loose.

Bowers *v.* Star Logging & Lumber Co. (Ore.), p. 300, vol. 26 (3 R R R).

That the practice of cutting off engine while train was in motion was unusual on their roads did not show negligence in injuring brakeman uncoupling moving cars.

Gorman *v.* Minneapolis & St. L. Ry. Co. (Iowa), p. 293, vol. 26 (3 R R R).

Though courts can presume that foreign law with respect to payment of wages of discharged employee are the same as its own, they cannot presume that foreign laws impose a certain penalty.

Louisiana & N. W. Ry. Co. *v.* Phelps (Ark.), p. 379, vol. 26 (3 R R R).

Under allegation that company had negligently allowed handhold to become defective and insecurely fastened to car, evidence was admissible that wood in which end of handhold was embedded was not sound.

Galveston, H. & S. A. Ry. Co. *v.* Jones (Tex.), p. 247, vol. 26 (3 R R R).

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When evidence of defendant's failure to use ordinary care is sufficient to go to the jury.  
*Dolan v. Sierra Ry. Co. of California (Cal.)*, p. 875, vol. 25 (2 R R R).

Where complaint against master alleged that "coupling pin was thrown with great force into plaintiff's face, striking him near his eyes, whereby serious injury was inflicted on plaintiff, his right eye being permanently impaired, disfigured, and injured and from which plaintiff has suffered great mental and physical pain and anguish," the clause "and from which plaintiff has suffered" etc., referred back to averment as to pin striking him; and plaintiff's testimony that from his blow he suffered pain was competent.

*Birmingham Southern Ry. Co. v. Cuzzart (Ala.)*, p. 312, vol. 26 (3 R R R).

Whether mismatched couplings proximate cause of death of brakeman.

*Southern Pac. Co. v. Winton (Tex.)*, p. 358, vol. 26 (3 R R R).

Whether negligence in failing to provide safe place to work where proximity of mail train caused injury to fireman.

*Kenney v. Meddaugh (C. C. A.)*, p. 226, vol. 28 (5 R R R).

Whether railroad fireman, at the time of an accident at a public crossing, was in active employ of company, or member of the public, was a question for the jury.

*Davis v. Atlanta & C. A. L. Ry. Co. (S. Car.)*, p. 317, vol. 26 (3 R R R).

Duty of fireman on train approaching station to look out for other train.

*Missouri, K. & T. Ry. Co. of Texas v. Williams (Tex.)*, p. 519, vol. 27 (4 R R R).

Effect of subsequent payment under statute imposing penalty for failure to pay wages.

*St. Louis, I. M. & S. Ry. Co. v. Pickett (Ark.)*, p. 569, vol. 27 (4 R R R).

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Erroneous instruction throwing burden of proof on plaintiff as to whether proper signals were given, in action for death of switchman caused by negligence in giving kick signal.  
*Gulf, C. & S. F. Ry. Co. v. Hill (Tex.)*, p. 1, vol. 28 (5 R R R).

Error in directing verdict for defendant in action for injury to employee.

*Wallace v. Central of Georgia Ry. Co. (Ga.)*, p. 591, vol. 27 (4 R R R).

**Evidence.**

Admissibility of evidence to show that employee responsible for accident looked bad and worried before he started on trip.

*St. Louis S. W. Ry. Co. v. Kelton (Tex.)*, p. 279, vol. 25 (2 R R R).

Admissibility of evidence to show that other railroads used slag for ballast, in action for injuries to flagman.

*Southern Ry. Co. v. McLellan (Miss.)*, p. 559, vol. 28 (5 R R R).

Admissibility of testimony of witness that he had examined car, where it was not shown how he learned the identity of car, in action for injury to employee from defective handhold.

*Galveston, H. & S. A. Ry. Co. v. Jones (Tex.)*, p. 247, vol. 26 (3 R R R).

Admissibility of testimony that engineer told brakeman to hurry up and get switch over as soon as possible, in action for injury to brakeman caused by his foot slipping between ties in defective track.

*Erie R. Co. v. Moore (C. C. A.)*, p. 44, vol. 25 (2 R R R).

Car inspectors not experts not qualified to give their opinion as to proper manner of running cars.

*Budge v. Morgan's L. & T. R. & S. S. Co. (La.)*, p. 440, vol. 27 (4 R R R).

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Car inspectors without scientific knowledge and without practical experience in handling and moving cars not qualified as experts in the matter of the causes which may operate to derail a car or prevent its tracks from working properly.

*Budge v. Morgan's L. & T. R. & S. S. Co. (La.)*, p. 440, vol. 27 (4 R R R).

Declaration of engineer acting in sport as *res gestæ* in action for injuries to child frightened by blowing off steam.

*Alsever v. Minneapolis & St. L. R. Co. (Iowa)*, p. 587, vol. 24 (1 R R R).

Declaration of engineer admissible against himself and not against master where they have been joined as defendant in action for death resulting from negligence of servant.

*Cincinnati, etc., Ry. Co. v. Cook (Ky.)*, p. 321, vol. 25 (2 R R R).

Declarations of injured employee.

*Southern Ry. Co. v. McLellan (Miss.)*, p. 559, vol. 28 (5 R R R).

Declarations of injured party.

*Atchison, etc., Ry. Co. v. Logan (Kan.)*, p. 639, vol. 28 (5 R R R).

Declarations of motorman as *res gestæ* in action for death of child.

*Sample v. Consolidated Light & Ry. Co. (W. Va.)*, p. 380, vol. 24 (1 R R R).

Employees as witnesses.

*Chicago City Ry. Co. v. Tuohy (Ill.)*, p. 1, vol. 27 (4 R R R).

Error in refusing to permit defendant to show that no accidents had ever happened before at place where flagman stumbled on slag ballast and was injured.

*Southern Ry. Co. v. McLellan (Miss.)*, p. 559, vol. 28 (5 R R R).

Evidence as to subsequent alterations, in action for injury to employee caused by

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roof of company's oil-house projecting over track.

*Gulf, C. & S. F. Ry. Co. v. Darby (Tex.)*, p. 327, vol. 25 (2 R R R).

Evidence as to who sent "hostler" out admissible as *res gestæ* in action for injury to car repairer, at work under car, caused by collision between such car and engine in charge of inexperienced hostler.

*Chicago Terminal Transfer R. Co. v. Stone (C. C. A.)*, p. 243, vol. 28 (5 R R R).

Evidence of advances to injured employee by his attorneys, inadmissible.

*Missouri, K. & T. Ry. Co. of Texas v. Bailey (Tex.)*, p. 518, vol. 27 (4 R R R).

Evidence of injured employee's consultation with his attorneys, not admissible.

*Missouri, K. & T. Ry. Co. of Texas v. Bailey (Tex.)*, p. 518, vol. 27 (4 R R R).

Evidence to show that brakeman causing accident requested superior to allow him to lie off and rest instead of starting on trip.

*St. Louis S. W. Ry. Co. v. Kelton (Tex.)*, p. 279, vol. 25 (2 R R R).

Expert testimony as to possible cause of accident, in action for death of employee killed on track.

*Louisville & N. R. Co. v. Banks (Ala.)*, p. 359, vol. 25 (2 R R R).

Harmless error in permitting brakeman to give his opinion as to speed of train at time of derailment, in action for death of conductor.

*International & G. N. Ry. Co. v. Vinson (Tex.)*, p. 372, vol. 26 (3 R R R).

Harmless error in permitting testimony of engineer that it was common for him to receive orders to look out for broken rails, in action for injury to employee.

*Mexican Cent. Ry. Co. v. Wilder (C. C. A.)*, p. 493, vol. 26 (3 R R R).

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*Southern Ry. Co. v. McLellan* (Miss.), p. 559, vol. 28 (5 R R R).

Opinion evidence as to competency of engineer.

*Hicks v. Southern Ry. Co.* (S. Car.), p. 540, vol. 27 (4 R R R).

Photographs of wreck in which fireman was injured.

*Southern Pac. Co. v. Huntsman* (C. C. A.), p. 203, vol. 28 (5 R R R).

Presumption that railroad company has no desire to subject their employees to unnecessary risks.

*Budge v. Morgan's L. & T. R. & S. S. Co.* (La.), p. 440, vol. 27 (4 R R R).

Testimony of engineer as to whether his engine was properly managed when an employee was killed on track.

*Louisville & N. R. Co. v. Banks* (Ala.), p. 359, vol. 25 (2 R R R).

Failure to stop train after discovering section hand's danger from train.

*Kelley v. Chicago, B. & Q. R. Co.* (Iowa), p. 634, vol. 28 (5 R R R).

Germane amendment to petition, in action for injury to fireman by reason of locomotive running into obstruction, under statutes of Virginia.

*Louisville & N. R. Co. v. Pointer* (Ky.), p. 181, vol. 28 (5 R R R).

Hostler taking yard master to dinner on engine, acting within scope of employment.

*Jensen v. Omaha & St. L. R. Co.* (Iowa), p. 46, vol. 27 (4 R R R).

In action by fireman for injuries sustained in collision, division superintendent and division train dispatcher were properly joined as parties with the railroad company.

*Howe v. Northern Pac. Ry. Co.* (Wash.), p. 624, vol. 28 (5 R R R).

Instruction erroneous for allowing jury to consider the continuing of his work by an

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employee working near track as evidence that he was engrossed in it, and, on that account, oblivious of approach of engine.

*Smith v. Atlanta & C. R. Co.* (N. Car.), p. 659, vol. 28 (5 R R R).

Insufficiency of evidence to show that box placed on rollers on push car for hauling earth was inadequate or unsafe.

*Corletti v. Southern Pac. Co.* (Cal.), p. 516, vol. 27 (4 R R R).

Insufficiency of evidence to show that safe place to work was not furnished.

*Raiford v. Wilmington & W. R. Co.* (N. Car.), p. 511, vol. 27 (4 R R R).

It cannot be said, as matter of law, that company is free from negligence where trainman is injured by reason of proximity of track.

*Morrisette v. Canadian Pac. Ry. Co.* (Vt.), p. 219, vol. 28 (5 R R R).

It was not error to permit defendant counsel to argue to jury the long and safe use of the place, in action for injury to flagman who stumbled on track and was injured.

*Southern Ry. Co. v. McLellan* (Miss.), p. 559, vol. 28 (5 R R R).

Joinder of master and servant, in action for death resulting from negligence of servant.

*Cincinnati, etc., Ry. Co. v. Cook* (Ky.), p. 321, vol. 25 (2 R R R).

Knowledge of company of existing defect in engine step.

*Kerrigan v. Chicago, M. & St. P. Ry. Co.* (Minn.), p. 531, vol. 27 (4 R R R).

Knowledge of servant communicated to master binding on latter.

*Hicks v. Southern Ry. Co.* (S. Car.), p. 540, vol. 27 (4 R R R).

Laborer's liens on railroad aid taxes under Iowa Code, not assignable.

*Kent v. Muscatine, N. & S. Ry. Co.* (Iowa), p. 100, vol. 27 (4 R R R).



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Liability a question for jury where inexperienced and un-instructed servant was injured while removing boiler from a brick wall.

Proffitt *v.* Missouri, K. & T. Ry. Co. of Texas (Tex.), p. 196, vol. 28 (5 R R R).

Liability for injury to child caused by wanton act of engineer in blowing off steam.

Alsever *v.* Minneapolis & St. L. R. Co. (Iowa), p. 587, vol. 24 (1 R R R).

Liability for injury to trainman as affected by speed at which train was run.

Martin *v.* Chicago, R. I. & P. R. Co. (Iowa), p. 361, vol. 28 (5 R R R).

Liability of company transferring car for defect causing injury to employee of other company.

Missouri, K. & T. Ry. Co. *v.* Merrill (Kan.), p. 209, vol. 28 (5 R R R).

Necessity of servant claiming laborer's lien on railroad aid taxes under Iowa Code.

Kent *v.* Muscatine, N. & S. Ry. Co. (Iowa), p. 100, vol. 27 (4 R R R).

Negligence in furnishing defective coupler and negligence in kicking cars while employee was coupling them pleaded as two causes of accident.

Voelker *v.* Chicago, M. & St. P. Ry. Co. (Iowa), p. 509, vol. 27 (4 R R R).

Negligence, instruction erroneous for using word "full" in qualifying knowledge of danger.

Pledger *v.* Texas Cent. Ry. Co. (Tex.), p. 64, vol. 27 (4 R R R).

Negligence, question for jury where fireman on freight train was injured in collision due to failure of engineer of other train to remain at station as ordered.

Southern Pac. Co. *v.* Huntsman (C. C. A.), p. 203, vol. 28 (5 R R R).

Negligence, sufficiency of evidence.

Cogdell *v.* Southern Ry. Co. (N. Car.), p. 39, vol. 27 (4 R R R).

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Negligence with respect to method by fastening stirrup. Missouri, K. & T. Ry. Co. of Texas *v.* Bailey (Tex.), p. 518, vol. 27 (4 R R R).

Negligently loading car not a failure of duty to furnish safe place to work.

Wells, Fargo & Co. *v.* Page (Tex.), p. 568, vol. 27 (4 R R R).

Nonsuit where servant was injured by defect of which he was as chargeable with notice as master.

De Lay *v.* Southern Ry. Co. (Ga.), p. 181, vol. 28 (5 R R R).

Not error for court to say reasonable care instead of ordinary care, in instructing as to degree of care required of master.

Louisville & N. R. Co. *v.* Pointer (Ky.), p. 181, vol. 28 (5 R R R).

Notice to employee when not notice to railroad.

Read *v.* City & Suburban Ry. Co. (Ga.), p. 278, vol. 26 (3 R R R).

Opinion evidence of engineer as to whether accident could have been prevented had a switchman been standing on the footboard of tender, in action for death of employee killed by train.

Louisville & N. R. Co. *v.* Banks (Ala.), p. 359, vol. 25 (2 R R R).

Presumption under employers' liability act of Indiana that negligent servant was acting within scope of employment.

Cincinnati, H. & D. R. Co. *v.* Thiebaud (C. C. A.), p. 26, vol. 27 (4 R R R).

Proximate cause of death of employee killed in derailment caused by enticing cattle on track with wasted cotton seed. Illinois Cent. R. Co. *v.* Seasmans (Miss.), p. 276, vol. 25 (2 R R R).

Proximate cause of injury to switchman on side ladder was its position.

Kilpatrick *v.* Grand Trunk Ry. Co. (Vt.), p. 945, vol. 27 (4 R R R).

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Question for jury whether failure to repair boiler was proximate cause of engineer's injuries.

*Olney v. Boston & M. R. R.* (N. H.), p. 550, vol. 28 (5 R R R).

Relation between railroad company and one acting as express messenger and also, with its consent and approval, as its baggageman.

*Missouri, K. & T. Ry. Co. of Texas v. Reasor* (Tex.), p. 281, vol. 26 (3 R R R).

Relation between railroad company and one acting as express messenger and also, with its consent and approval, as its baggage man, sufficiency of evidence.

*Missouri, K. & T. Ry. Co. of Texas v. Reasor* (Tex.), p. 281, vol. 26 (3 R R R).

**Release.**

Contract with next of kin purporting to release railroad company from liability for death of employee knocked from side ladder of car no defence in action for such death, under Vermont statute requiring such ladders to be placed on inside or at rear of cars.

*Tarbell v. Rutland R. Co.* (Vt.), p. 368, vol. 26 (3 R R R).

Contract with next of kin releasing company from liability for death of employee, invalid as against public policy.

*Tarbell v. Rutland R. Co.* (Vt.), p. 368, vol. 26 (3 R R R).

Contract with next of kin releasing company from liability for death of employee, no defence in action for such death, under Vermont statutes providing for imprisonment of negligent railroad agents.

*Tarbell v. Rutland R. Co.* (Vt.), p. 368, vol. 26 (3 R R R).

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- Works described in complaint of such usual and customary character as not to require rules for its conduct. *Boyer v. Eastern Ry. Co. of Minnesota* (Minn.), p. 457, vol. 28 (5 R R R).
- Scope of engineer's employment where a child was injured by torpedo placed upon track for former's amusement. *Euting v. Chicago & N. W. Ry. Co.* (Wis.), p. 513, vol. 28 (5 R R R R).
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- Statutory provision as to payment of wages to discharged employees, not applicable to foreign contract of employment. *Louisiana & N. W. Ry. Co. v. Phelps* (Ark.), p. 379, vol. 26 (3 R R R R).
- Stipulation in contract of employment requiring trainmen to take a notice of obstruction near track constitutes too indefinite notice of its existence to base an instruction upon. *Gulf, C. & S. F. Ry. Co. v. Darby* (Tex.), p. 327, vol. 25 (2 R R R R).
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- Sufficiency of allegation of existence of defect in engine step. *Galveston, etc., R. Co. v. Abbey* (Tex.), p. 50, vol. 27 (4 R R R).
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- Sufficiency of evidence of negligence where promise to repair boiler and failure to do so. *Olney v. Boston & M. R. R.* (N. H.), p. 550, vol. 28 (5 R R R).
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Fact that acts of negligence causing injury to passenger are alleged conjunctively does not require plaintiff to prove that all elements of negligence alleged concurred to produce the injury.

Duell *v.* Chicago & N. W. Ry. Co. (Wis.), p. 594, vol. 28 (5 R R R).

Failure to provide lights must be pleaded in action for injury to passengers.

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Gross negligence, definition.

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Gross negligence implies utter want of caution or care, amounting to recklessness, and complete disregard of the care a man owes himself.

Davis *v.* Atlanta & C. A. L. Ry. Co. (S. Car.), p. 317, vol. 26 (3 R R R).

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Implied invitation as part of the law of negligence.

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Pleading wantonness and wilfulness in action for injury where crossing street railway tracks.

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Right to recover for mere negligence where gross negligence is alleged.

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Same test must be applied to conduct of both parties in determining whether cause of action is proximate or remote.

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Sufficiency of evidence to show negligence where passenger was injured in accident caused by fallen tree across track.

*Alabama Midland Ry. Co. v. Guilford (Ga.)*, p. 62, vol. 25 (2 R R R).

What constitutes negligence a question of law, but whether negligence exists in a particular case is a question of fact.

*Neal v. Wilmington & N. C. Electric Ry. Co. (Del.)*, p. 386, vol. 28 (5 R R R).

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- Admissions that officer of corporation had authority to execute note, sufficient to estop corporation.
- Baines v. Coos Bay, etc., R. & Nav. Co.* (Ore.), p. 412, vol. 26 (3 R R R).
- Agent employed to solicit traffic for foreign railroad company a managing agent for purpose of receiving summons for company.
- Fremont, etc., R. Co. v. New York, etc., R. Co.* (Neb.), p. 470, vol. 28 (5 R R R).
- New York, etc., R. Co. v. Fremont, etc., R. Co.* (Neb.), p. 470, vol. 28 (5 R R R).
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- Chesapeake & W. R. Co. v. Washington, C. & St. L. R. Co.* (Va.), p. 444, vol. 26 (3 R R R).
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- Foreign corporation becoming domestic corporation under statute of South Carolina is a nonresident of that state for purposes of removal of case to federal court.
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In an action against a railroad company, it is not a charge on facts to say, "I feel confident that you will not be influenced by the fact that the railroad is a rich corporation."

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Invalidity of reorganization, fraudulent against creditors.

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Laws 1850, c. 140, of New York, providing for the construction of intersections of railroads applicable to the intersection of street railroad operated by electricity with railroad operated by steam.

Stillwater & M. St. Ry. Co. *v.* Boston & M. R. Co. (N. Y.), p. 115, vol. 28 (5 R R R).

Laws 1890 of New York, c. 565, do not permit a railroad to select a new terminus in an adjoining county, seven miles from its original terminus, extending its line thereto, where such change is only made for the purpose of increasing the business of the road.

Greenwich & J. Ry. Co. *v.* Greenwich & S. Electric R. R. (N. Y.), p. 329, vol. 28 (5 R R R).

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Sale of railroad property does not cause dissolution of corporation.

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Municipal grant to construct railroad in street when accepted, constitutes a contract. *Town of Mason v. Ohio River R. Co.* (W. Va.), p. 899, vol. 25 (2 R R R).

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*Town of Mason v. Ohio River R. Co.* (W. Va.), p. 899, vol. 25 (2 R R R).

Obstruction of crossing by railroad company may be remedied by mandamus.

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Upon issuance of mandamus the court will direct particularly other measures so as not to impair its usefulness.

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Cost of constructing old roadbed by trespassing corporation, not element of damages in action to recover value of old railroad's right of way.

*Cochran v. Missouri, K. & T. Ry. Co.* (Mo.), p. 502, vol. 26 (3 R R R).

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*Cedar Rapids & M. City Ry. Co. v. City of Cedar Rapids* (Iowa), p. 745, vol. 28 (5 R R R).

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Deflection of road not an abandonment of enterprise within meaning of deed providing for forfeiture.

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*Cochran v. Missouri, K. & T. Ry. Co.* (Mo.), p. 502, vol. 26 (3 R R R).

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Failure of railroad company to construct crossing, or to do any other collateral acts required by first portion of contract did not work forfeiture of right of way.

*Gratz v. Highland Scenic R. Co.* (Mo.), p. 394, vol. 28 (5 R R R).

Federal statute providing for the use of military and post roads by telegraph companies does not authorize such companies to appropriate private lands for their right of way.

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Insufficiency of evidence to warrant decree for plaintiff, in action to have deed set aside on the ground that a portion of granted way was deflected from.

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- of expiration of one lease and execution of another.  
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- Prior agreement could not be looked to to show that railroad embankment was not conveyed by subsequent deed.  
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- Where railroad, in the condemnation of land for right of way fails to proceed in conformity with its legal power, all its acts on the land are trespasses, for which it is liable.  
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A town cannot maintain a suit against a railroad for giving its name to a station near it.

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Citizen, whose interest in public park differs only in degree from that of other residents of city, not entitled to enjoin condemnation of it for railroad station.

*Manson v. South Bound R. Co.* (S. Car.), p. 338, vol. 28 (5 R R R).

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*Texas & P. Ry. Co. v. Parker* (Tex.), p. 906, vol. 26 (3 R R R).

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When maxim "expressio unius est exclusio alterius," is applicable.

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Action under Georgia statute should be brought in county where principal office of railroad company is located.

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Admissibility of evidence as to equipment of engine and character of headlight, in action to recover damages for killing mule at night.

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Admissibility of evidence that openings in fence were necessary, in action for loss of stock drowned through failure to leave openings in railroad fence.

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Application of Texas statute creating absolute liability where stock is not killed by train but because of condition of roadbed.

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A railroad company which does not fence its track is not liable for cattle injured while crossing trestle on right of way by reason of its construction.

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Peremptory instruction for defendant not warranted.

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Permitting animals to run at large no defense where injury was caused by failure to fence.

*Texas & P. Ry. Co. v. Seay* (Tex.), p. 866, vol. 26 (3 R R R).

Statements of plaintiff's foreman that he might have cut fence, in action for loss of stock drowned through failure to leave openings in railroad fence.

*Gulf, etc., Ry. Co. v. Clay* (Tex.), p. 28, vol. 25 (2 R R R).

The fact that the horse killed by reason of defective cattle guard was trespassing on right of way no defense.

*Herrell v. Chicago, M. & St. P. Ry. Co.* (Wis.), p. 337, vol. 27 (4 R R R).

Using pasture after knowledge of construction of fence without openings, in action for loss of stock drowned through failure to leave openings in railroad fence.

*Gulf, etc., Ry. Co. v. Clay* (Tex.), p. 28, vol. 25 (2 R R R).

Defective cattle guard proximate cause of killing stock where they had passed over other cattle guards.

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Drowning of stock through failure to leave openings in railroad fence.

*Gulf, etc., Ry. Co. v. Clay* (Tex.), p. 28, vol. 25 (2 R R R).

Duty of engineer after discovery of stock upon track.

*Houston & T. C. Ry. Co. v. Hollingsworth* (Tex.), p. 905, vol. 25 (2 R R R).

Duty of engineer seeing frightened horse running into danger.

*Alabama G. S. R. Co. v. Hall* (Ala.), p. 73, vol. 28 (5 R R R).

Duty to look out for stock on track.

*Kansas City, M. & B. R. Co. v. Henson* (Ala.), p. 674, vol. 24 (1 R R R).

Evidence, admissibility of evidence that track was fenced to within thirty or forty feet of switch where company claimed that fence so near switch would interfere with the switching of trains.

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Failure to prove place of accident under Arkansas statute, requiring such actions to be brought in county where killing occurred.

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*Houston & T. C. Ry. Co. v. Hollingsworth* (Tex.), p. 905, vol. 25 (2 R R R).

Insufficiency of inclosure, permitting animals to run at large.

*Houston & T. C. Ry. Co. v. Hollingsworth* (Tex.), p. 905, vol. 25 (2 R R R).

Liability fixed by place of entry in fence.

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Liability for injuries to boy received in crossing tracks, after passing through freight yard, as affected by failure to fence between tracks and freight yard, or between yard and street, under Massachusetts statute requiring railroad companies to fence roads to prevent entrance of cattle.

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Liability of consolidated company under contract to maintain side tracks for convenience of sawmill owner entered into in consideration of release from damages for injuries to stock and from fires.

*Missouri, K. & T. Ry. Co. of Texas v. Carter* (Tex.), p. 539, vol. 26 (3 R R R).

Liability of railroad company where stock came upon track through opening in a fence used for convenience of adjacent owner.

*International & G. N. R. Co. v. Richmond* (Tex.), p. 910, vol. 25 (2 R R R).

Liability where fence was defective, but mule escaped to track through open gate.

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Liability where stock were drowned in unprecedented flood through failure to leave openings in railroad fence.

*Gulf, etc., Ry. Co. v. Clay* (Tex.), p. 28, vol. 25 (2 R R R).

Negligence in running over stock and breach of contract to fence, misjoinder of causes of action.

*Evans v. Southern Ry. Co.* (Ala.), p. 859, vol. 26 (3 R R R).

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Negligence of trainmen in failing to maintain lookout.

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Negligence, question for jury where plaintiff's team was injured while used in repairing track.

*Kansas City, M. & B. R. Co. v. Wagand* (Ala.), p. 25, vol. 28 (5 R R R).

Negligence was question for jury.

*Illinois Cent. R. Co. v. Gholson* (Ky.), p. 770, vol. 27 (4 R R R).

Not necessary to prove negligence under Louisiana statute, in action to recover value of stock.

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Opening in fence used by adjacent owner.

*International & G. N. R. Co. v. Richmond* (Tex.), p. 910, vol. 25 (2 R R R).

Plaintiff was entitled to recover because of failure to maintain lookout for trespassing stock.

*Kansas City, M. & B. R. Co. v. Wagand* (Ala.), p. 25, vol. 28 (5 R R R).

Plaintiff was not entitled to maintain trover for injured mule abandoned by him and sold by trainmen.

*Kansas City, M. & B. R. Co. v. Wagand* (Ala.), p. 25, vol. 28 (5 R R R).

Presumption of liability for killing of stock on track where company had contracted with landowner to fence right of way.

*Evans v. Southern Ry. Co.* (Ala.), p. 859, vol. 26 (3 R R R).

Presumption of negligence from killing of stock overcome.

*Felton v. Anderson* (Ky.), p. 114, vol. 27 (4 R R R).

Rebuttal of presumption of negligence from injury to stock.

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Right of owner of land not bordering on railroad track to recover for animals killed

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which escaped through lands of another adjoining railroad. *Houston & T. C. Ry. Co. v. Hollingsworth* (Tex.), p. 905, vol. 25 (2 R R R).

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Statutory requirements in regard to signals and speed at crossing not applicable where mare suddenly ran upon track. *Georgia & A. Ry. Co. v. Cook* (Ga.), p. 497, vol. 24 (1 R R R).

Sufficiency of complaint in action for injury to horse driven into trestle.

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Sufficiency of complaint in action for killing stock where company had contracted with landowner to fence right of way.

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*Alabama G. S. R. Co. v. Hall* (Ala.), p. 73, vol. 28 (5 R R R).

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*Southern Ry. Co. v. Camp* (Ga.), p. 772, vol. 27 (4 R R R).

Sufficiency of evidence to show negligence in killing stock.

*Southern Ry. Co. v. Gilmore* (Ga.), p. 852, vol. 27 (4 R R R).

Sufficiency of evidence to show that horse was killed within

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*Herrell v. Chicago, M. & St. P. Ry. Co.* (Wis.), p. 337, vol. 27 (4 R R R).

Sufficiency of evidence to support verdict in action for loss of stock drowned through failure to leave openings in railroad fence.

*Gulf, etc., Ry. Co. v. Clay* (Tex.), p. 28, vol. 25 (2 R R R).

Sufficiency of proof that injury occurred in certain county, under Arkansas statute providing that such actions shall be brought in county where injury occurred.

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Sufficiency of railroad gate at private crossing, question for jury.

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*Southern Ry. Co. v. Brock* (Ga.), p. 771, vol. 27 (4 R R R).

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Louisville & N. R. Co. *v.* McClish (C. C. A.), p. 942, vol. 26 (3 R R R).

Trespassing on train is not such contributory negligence as to prevent recovery for improper ejection.

Johnson *v.* Chicago, etc., Ry. Co. (Iowa), p. 504, vol. 24 (1 R R R).

Walking on trestle.

Weeks *v.* Wilmington & W. R. Co. (N. Car.), p. 28, vol. 28 (5 R R R).

Defendant was not guilty under doctrine of discovered peril where trespasser jumped from trestle through fright.

Weeks *v.* Wilmington & W. R. Co. (N. Car.), p. 28, vol. 28 (5 R R R).

Duty to look out for trespassers at point where ordinance makes it an offense to cross track.

Martin *v.* Chicago & N. W. Ry. Co. (Ill.), p. 718, vol. 24 (1 R R R).

Duty to person going on train to purchase from fruit vendor.

Carter *v.* Charleston & W. C. Ry. Co. (S. Car.), p. 87, vol. 28 (5 R R R).

Duty to persons walking on track used as foot path.

Haltiwanger *v.* Columbia, N. & L. R. Co. (S. Car.), p. 883, vol. 26 (3 R R R).

Duty to prevent trespasser on

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train from being injured in probable collision.

Louisville & N. R. Co. *v.* Kemery (Ky.), p. 515, vol. 24 (1 R R R).

Duty to trespassers on track.

Brooks *v.* Pittsburgh, etc., Ry. Co. (Ind.), p. 521, vol. 24 (1 R R R).

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Duty to trespassers on track, lookouts.

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Feedback *v.* Missouri Pac. Ry. Co. (Mo.), p. 713, vol. 24 (1 R R R).

Effect of knowledge of facts suggesting inquiry as to whether passengers may ride on freight train.

Purple *v.* Union Pac. R. Co. (C. C. A.), p. 711, vol. 26 (3 R R R).

Ejection of passenger riding on freight train without permit, relying on representations of agent which he knows to be false.

Houston E. & W. T. Ry. Co. *v.* Stell (Tex.), p. 722, vol. 26 (3 R R R).

Ejection of trespasser from moving train.

Illinois Cent. R. Co. *v.* McManus (Ky.), p. 572, vol. 25 (2 R R R).

Ejection of trespasser within scope of brakeman's authority.

Illinois Cent. R. Co. *v.* McManus (Ky.), p. 527, vol. 25 (2 R R R).

Evidence as to time within which another train could be stopped.

Vanarsdell *v.* Louisville & N. R. Co. (Ky.), p. 61, vol. 24 (1 R R R).

Failure to stop train after seeing person on track.

Chicago Terminal Transfer Co. *v.* Kotoski (Ill.), p. 530, vol. 28 (5 R R R).

Gross negligence may entitle a trespasser to recover.

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Implied authority of brakeman to eject.

*O'Banion v. Missouri Pac. Ry. Co.* (Kan.), p. 929, vol. 27 (4 R R R).

Insufficiency of evidence of negligence where trespassing child was injured by explosion of torpedo on track.

*Louisville & N. R. Co. v. Hart* (Ky.), p. 521, vol. 28 (5 R R R).

Liability for forcing trespasser from moving car.

*Johnson v. Chicago, etc., Ry. Co.* (Iowa), p. 504, vol. 24 (1 R R R).

Liability for injury to person on freight train with consent of conductor.

*Baltimore & O. S. W. Ry. Co. v. Cox* (Ohio), p. 939, vol. 26 (3 R R R).

Liability for injury to person riding on hand car by invitation of section foreman, caused by negligence in running around curve without signal.

*Rathbone v. Oregon R. Co.* (Ore.), p. 511, vol. 24 (1 R R R).

Liability for injury to trespasser guilty of contributory negligence as affected by running train at speed in violation of ordinance and failure to signal.

*Brooks v. Pittsburgh, etc., Ry. Co.* (Ind.), p. 521, vol. 24 (1 R R R).

Liability for injury to trespasser on train.

*Crawleigh v. Galveston, H. & S. A. Ry. Co.* (Tex.), p. 630, vol. 25 (2 R R R).

Liability for injury to trespasser walking on ends of cross-ties where no evidence of wantonness.

*Mizzell v. Southern Ry. Co.* (Ala.), p. 514, vol. 24 (1 R R R).

Liability for injury to trespasser where trainman was chargeable with notice of his peril.

*Denver & R. G. R. Co. v. Buffehr* (Colo.), p. 762, vol. 27 (4 R R R).

Liability of company when trespasser is on train without invitation.

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*S. A. Ry. Co.* (Tex.), p. 630, vol. 25 (2 R R R).

Liability of railroad company to trespasser on its tracks for injury wilfully or intentionally inflicted.

*Denver & R. G. R. Co. v. Buffehr* (Colo.), p. 762, vol. 27 (4 R R R).

Negligence after discovery of plaintiff's peril.

*Denver & R. G. R. Co. v. Buffehr* (Colo.), p. 762, vol. 27 (4 R R R).

Negligence in ejecting trespasser from train.

*Johnson v. Chicago, etc., Ry. Co.* (Iowa), p. 504, vol. 24 (1 R R R).

One entering train with understanding with conductor not to pay fare, a trespasser.

*Purple v. Union Pac. R. Co.* (C. C. A.), p. 711, vol. 26 (3 R R R).

One riding on train prohibited from carrying passengers, a trespasser.

*Purple v. Union Pac. R. Co.* (C. C. A.), p. 711, vol. 26 (3 R R R).

One who has paid fare, riding on freight train with consent of conductor, is a passenger.

*Crawleigh v. Galveston, H. & S. A. Ry. Co.* (Tex.), p. 630, vol. 25 (2 R R R).

Opinion evidence as to time within which train could be stopped.

*Vanarsdell v. Louisville & N. R. Co.* (Ky.), p. 61, vol. 24 (1 R R R).

Parent who is wrongfully on track is not a trespasser in subsequent efforts to save his child from injury by train.

*San Antonio & A. P. Ry. Co. v. Gray* (Tex.), p. 828, vol. 25 (2 R R R).

Person going on railroad track, though in accordance with the custom of the inhabitants of the locality, without objection from company, a trespasser.

*Louisville & N. R. Co. v. Mitchell* (Ala.), p. 425, vol. 27 (4 R R R).

Person riding on hand car by invitation of section foreman.

*Rathbone v. Oregon R. Co.* (Ore.), p. 511, vol. 24 (1 R R R).

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Person riding on train at invitation of trainman a trespasser.

*Burns v. Southern Ry. Co. (S. Car.),* p. 287, vol. 27 (4 R R R).

Presumption that pedestrian will avoid danger from train.

*Humphreys v. Valley R. Co. (Va.),* p. 649, vol. 28 (5 R R R).

Question for jury whether trespasser on bridge was seen in time.

*Vanarsdell v. Louisville & N. R. Co. (Ky.),* p. 61, vol. 24 (1 R R R).

Right of conductor to cause arrest of person guilty of misdemeanor in stealing ride.

*Southern Ry. Co. v. Gresham (Ga.),* p. 509, vol. 24 (1 R R R).

Statute making act of boarding moving train no defence in action for forcible ejection from such train.

*Johnson v. Chicago, etc., Ry. Co. (Iowa),* p. 504, vol. 24 (1 R R R).

Sufficiency of evidence in action for killing trespasser on track.

*Haltiwanger v. Columbia, N. & L. R. Co. (S. Car.),* p. 883, vol. 26 (3 R R R).

Sufficiency of evidence of negligence after discovery of peril.

*Humphreys v. Valley R. Co. (Va.),* p. 649, vol. 28 (5 R R R).

Sufficiency of evidence of payment of fare.

*Crawleigh v. Galveston, H. & S. A. Ry. Co. (Tex.),* p. 630, vol. 25 (2 R R R).

Sufficiency of evidence of payment of fare to show that deceased was a passenger.

*Crawleigh v. Galveston, H. & S. A. Ry. Co. (Tex.),* p. 630, vol. 25 (2 R R R).

Sufficiency of evidence to show knowledge on part of trainmen of trespasser's peril.

*Missouri, etc., Ry. Co. of Texas v. Haltom (Tex.),* p. 58, vol. 24 (1 R R R).

Tracks adjacent to station not public places.

*James v. Illinois Cent. R. Co. (Ill.),* p. 232, vol. 27 (4 R R R).

Trespasser walking on end of cross-ties could not complain

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that trainman was guilty of negligence in failing to give signals of approach.

*Mizzell v. Southern Ry. Co. (Ala.),* p. 514, vol. 24 (1 R R R).

Whether person intending to become a passenger was a trespasser while crossing a trestle by invitation of conductor, in order to reach train, was a question for the jury.

*Chicago Terminal Transfer Co. v. Kotoski (Ill.),* p. 530, vol. 28 (5 R R R).

**TRESTLES.**

*See Water and Watercourses.*

**TRIALS.**

*See Damages.*

Affidavits of jurors that, pending their deliberation, foreman stated that he was familiar with defendant's depot, and that it was not uniformly heated, which was a material issue, not admissible to impeach verdict for plaintiff.

*St. Louis S. W. Ry. Co. of Texas v. Ricketts (Tex.),* p. 467, vol. 28 (5 R R R).

Evidence as to misconduct of jury.

*West Chicago St. R. Co. v. Tuerk (Ill.),* p. 1, vol. 24 (1 R R R).

Remarks of counsel tending to discredit value of instructions.

*Chicago & A. R. Co. v. McDonnell (Ill.),* p. 211, vol. 24 (1 R R R).

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**TRUST FUNDS.**

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**TURNTABLES.**

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**ULTRA VIRES.**

*See Street Railways.*

Estoppel of railroad to claim that stipulation requiring it to operate towboats was ultra vires.

*Atkins v. Shreveport & R. R. V. Ry. Co. (La.),* p. 651, vol. 24 (1 R R R).

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Power of railroad to stipulate that it would operate towboats.  
*Atkins v. Shreveport & R. R. V. Ry. Co. (La.)*, p. 651, vol. 24 (1 R R R).

That the act of a railroad company in building a certain spur track was ultra vires did not justify entry on track by another company.

*Texarkana & Ft. S. Ry. Co. v. Texas & N. O. R. Co. (Tex.)*, p. 631, vol. 27 (4 R R R).

**UNPROTECTED PLATFORMS.**

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**VACCINATION.**

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**VENUE.**

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**VERDICT.**

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Excessive, when not in action against master for injuries received by servant.

*Dolan v. Sierra Ry. Co. of California (Cal.)*, p. 875, vol. 25 (2 R R R).

Excessive, when not, where decedent can do light work.

*Chesapeake & O. Ry. Co. v. Dupee (Ky.)*, p. 818, vol. 25 (2 R R R).

Refusal to direct verdict in action for injuries due to derailment of train, when erroneous.  
*Whipple v. Michigan Cent. R. Co. (Mich.)*, p. 774, vol. 25 (2 R R R).

When proper to refuse to direct verdict in action for death by wrongful act.

*Suburban R. Co. v. Balkwill (Ill.)*, p. 784, vol. 25 (2 R R R).

When verdict will not be disturbed on appeal.

*Dolan v. Sierra Ry. Co. of California (Cal.)*, p. 875, vol. 25 (2 R R R).

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**VESTIBULED TRAINS.**

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**VIBRATION.**

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**VICE PRINCIPALS.**

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**VIEWERS.**

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**VOLUNTARY DUTIES.**

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**WAGES.**

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**WANTONNESS.**

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**WAREHOUSEMEN.**

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**WATER AND WATER-COURSES.**

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Accrual of action for overflow caused by insufficient pipe through embankment.

*Cleveland, C., C. & St. L. Ry. Co. v. Kline (Ind.)*, p. 543, vol. 25 (2 R R R).

Accrual of action for overflow of land caused by insufficiency of culvert.

*Kelly v. Pittsburgh, C., C. & St. L. Ry. Co. (Ind.)*, p. 547, vol. 25 (2 R R R).

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*Southern Ry. Co. v. Plott (Ala.)*, p. 439, vol. 24 (1 R R R).

Commencement of adverse user as the basis for a prescriptive right to overflow land.

*Kelly v. Pittsburgh, C., C. & St. L. Ry. Co. (Ind.)*, p. 547, vol. 25 (2 R R R).

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Damages for obstructing watercourse through negligence in obstructing railroad embankment.

Lampley *v.* Atlantic Coast Line R. Co. (S. Car.), p. 389, vol. 26 (3 R R R).

**Duty to minimize damages.**

Armistead *v.* Shreveport & R. R. Val. Ry. Co. (La.), p. 868, vol. 26 (3 R R R).

Enhancing damages by carrier where navigable stream was obstructed by railroad bridge.

Armistead *v.* Shreveport & R. R. Val. Ry. Co. (La.), p. 868, vol. 26 (3 R R R).

Liability for obstruction of navigable steam by railroad bridge as affected by act of carrier in abandoning freight.

Armistead *v.* Shreveport & R. R. Val. Ry. Co. (La.), p. 868, vol. 26 (3 R R R).

Loss of profits by carrier through obstruction of navigable stream.

Armistead *v.* Shreveport & R. R. Val. Ry. Co. (La.), p. 868, vol. 26 (3 R R R).

Measure of damage to carrier from obstruction of navigable stream by railroad bridge.

Armistead *v.* Shreveport & R. R. Val. Ry. Co. (La.), p. 868, vol. 26 (3 R R R).

Duty to construct roadbed so as not to cause overflow.

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Evidence as to washing away of track at other points, in action against railroad company to recover damages resulting from overflow.

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Insufficient culvert causing overflow of adjacent property as a public nuisance.

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(Neb.), p. 428, vol. 24 (1 R R R).

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Armistead *v.* Shreveport & R. R. Val. Ry. Co. (La.), p. 868, vol. 26 (3 R R R).

Liability for overflow of culvert caused by construction of side track dependent upon whether use for side track was reasonable use of land.

Priest *v.* Boston & M. R. R. (N. H.), p. 554, vol. 25 (2 R R R).

Municipality jointly liable with railroad company for damages caused by overflow from insufficiency of culvert.

Kelly *v.* Pittsburgh, C., C. & St. L. Ry. Co. (Ind.), p. 547, vol. 25 (2 R R R).

Negligence in obstructing watercourse in constructing embankment.

Lampley *v.* Atlantic Coast Line R. Co. (S. Car.), p. 389, vol. 26 (3 R R R).

Prospective damages for overflow caused by insufficiency of pipe through embankment could not be recovered under complaint.

Cleveland, C., C. & St. L. Ry. Co. *v.* Kline (Ind.), p. 543, vol. 25 (2 R R R).

Right of private individual to compensation where navigable water obstructed by trestle authorized by congress.

Frost *v.* Washington County R. Co. (Me.), p. 184, vol. 27 (4 R R R).

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Chicago, etc., R. Co. *v.* Shaw (Neb.), p. 428, vol. 24 (1 R R R).

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Sufficiency of petition in action for obstructing watercourse through negligence in constructing embankment.

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Whether railroad trestle over navigable water an unlawful obstruction, conclusiveness of determination of question by congress.

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*Chicago City Ry. Co. v. Tuohy (Ill.), p. 1, vol. 27 (4 R R R).*

Impeachment, right to new trial as affected by a failure to produce affidavit of stenographer which was merely cumulative evidence.

*Chicago & N. W. Ry. Co. v. Calumet Stock Farm (Ill.), p. 162, vol. 24 (1 R R R).*

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**YARDS.**

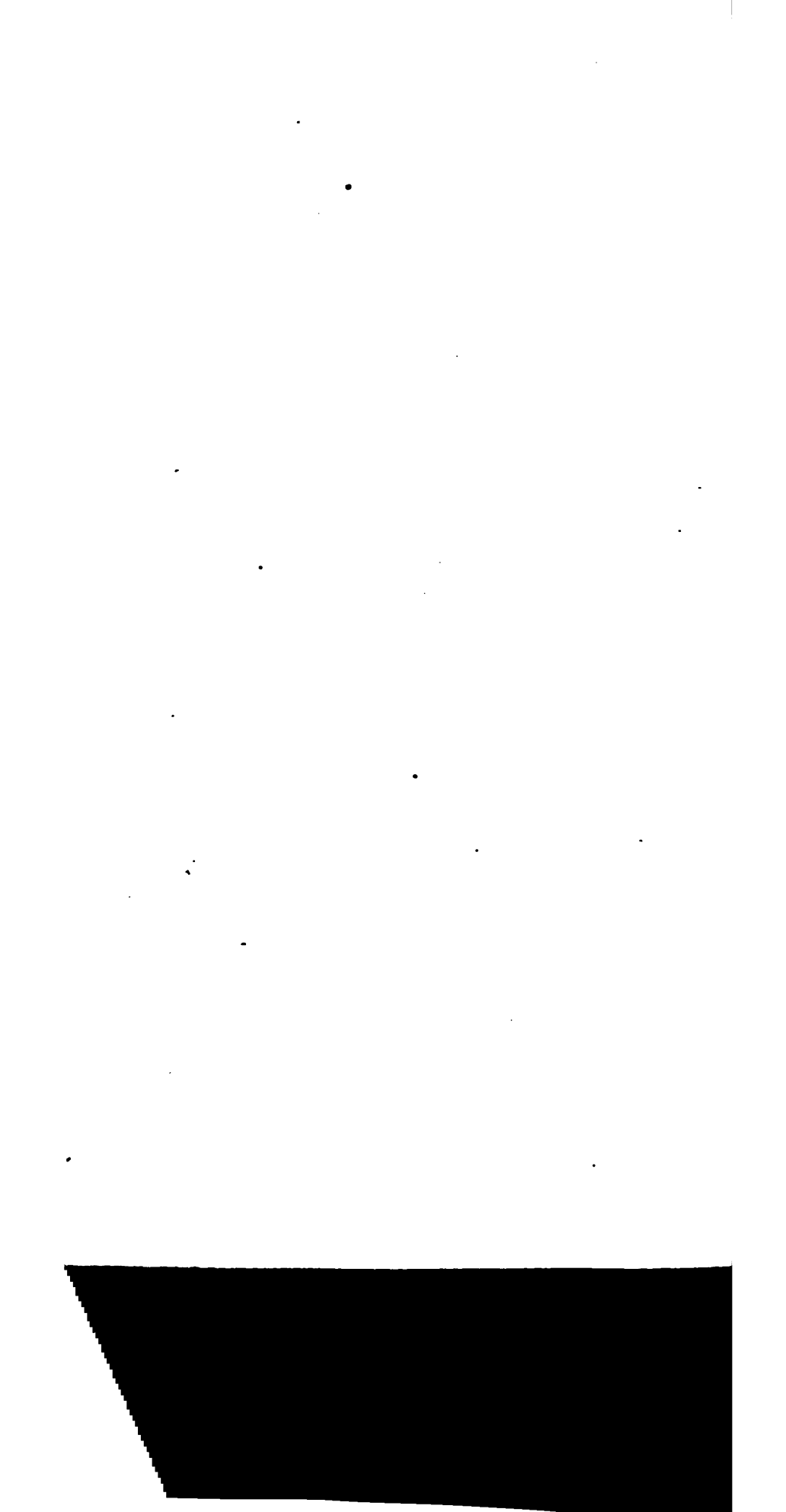
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